

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~202~~ 59

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 18, 1960
CERTIORARI GRANTED MAY 16, 1960

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APPENDIX

Civil Docket 133-28

UNITED STATES DISTRICT COURT

UNITED STATES OF AMERICA

v.

FRANK COSTELLO

For plaintiff:

U. S. ATTORNEY

For defendant:

HAYS, ST. JOHN, ABRAMSON & HEILBRON
EDWARD BENNETT WILLIAMS
120 Broadway, N. Y. 5

Docket Entries

May 1-58—Filed complaint and issued summons.

May 6-58—Filed summons and return. Served deft 5-5-58.

July 3-58—Filed Stip extending time of deft. to answer to 7-10-58. Clerk.

July 8-58—Filed Answer of deft — HStJ A & H.

July 24-58—Filed Note of Issue and Statement Pursuant Cal Rule 5.

Sept. 10-58—Filed affdvt and Notice of Motion for order granting preference, etc. Ret. 8-19-58.

9-8-58—Memo End. Motion granted to extent indicated
—Cause set for head of ready cases sent out for trial on 12-1-58. Clancy, J.

Nov. 7-58—Filed affdvt and Notice of Motion re taking deposition etc. Ret. 11-12-58.

Nov. 18-58—Memo End. on Motion filed 11-7-58: Motion disposed of as agreed upon by counsel. Order to be submitted. Bryan, J.

Nov. 19-58—Filed notice of taking deposition of John McLeod.

Nov. 19-58—Filed notice of taking deposition of Philip Coffey.

Dec. 5-58—Filed affdvt for Writ of Habeas Corpus and issued writ Ret. 12-8-58.

Dec. 11-58—Before Dawson, J. Trial begun.

Dec. 12-58—Trial continued.

Dec. 16-58—Filed Notice of taking deposition of Helen Sausser.

Dec. 18-58—Filed Transcript of record of proceedings of Dec. 11, 12, 15, 1958.

Dec. 15-58—Trial continued. Before Dawson, J. Adj. to 1-5-59.

Jan. 5-59—Before Dawson, J. Trial continued from Dec. 15-1958.

Jan. 6-59—Trial continued.

Jan. 7-59—Trial continued.

Jan. 8-59—Trial continued—Decision Reserved. Summations heard.

Feb. 2-59—Filed copy of affdvt for Writ of Habeas Corpus. Memo End. (12-5-58) Writ executed.

Feb. 10-59—Filed transcript of record of Proceedings of January 5, 6, 7, 8, 1959.

Feb. 20-59—Filed Opinion No. 24,895—Judgment granted revoking and setting aside order of court of 9-10-25 admitting deft to citizenship, and cancelling Certificate of Naturalization issued to Deft on that date. Opinion

constitutes findings of fact and conclusions of law of the Court. Let judgment be entered accordingly. Dawson, J. (see opinion) Judgment entered. Clerk mailed notice of entry 2-20-59.

Mar. 9-59—Filed supplemental judgment vacating order admitting deft to citizenship—cancelling certificate of naturalization issued to deft 9-10-25—that deft is not and never was a naturalized citizen etc. and that deft surrender certificate of naturalization to Immigration & Naturalization Serv. etc. Dawson, J. Judgment entered. Clerk: Mailed notice of entry 3-10-59.

Apr. 17-59—Filed deft's notice of appeal—Mailed copy to US Atty 4-18-59.

A True Copy

JOHN A. MAURIELLO
Deputy Clerk.

(Seal)

1020

Complaint

Civ. 133-28

Plaintiff, UNITED STATES OF AMERICA, by PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, as and for its complaint herein, alleges as follows:

First: Plaintiff, United States of America, is a sovereign body politic.

Second: This action is instituted pursuant to the provisions of Title 8, United States Code, Section 1451(a) to revoke and set aside the order of this Court entered September 10, 1925, admitting the defendant Frank Costello to United States citizenship, and to cancel

certificate of naturalization No. 2136470, issued by this Court to the defendant Frank Costello on September 10, 1925, on the ground that the order and certificate of naturalization were procured by the concealment of material facts and by wilful misrepresentation.

Third: Affidavits showing good cause for the institution of these proceedings are annexed hereto as Exhibits A, B, C, D and E, and are made a part hereof. Also annexed hereto as Exhibit F and made a part hereof is a letter from Malcolm Anderson, Assistant Attorney General in charge of the Criminal Division, Department of Justice, authorizing and directing institution of this action.

1021 Fourth: The last known place of voluntary residence of the defendant Frank Costello in the United States was and continues to be at 115 Central Park West, in the Borough of Manhattan, City and State of New York and within the Southern District of New York.

Fifth: The defendant filed a petition for naturalization in the United States District Court for the Southern District of New York on May 1, 1925 and on September 10, 1925 was admitted to citizenship by order of that Court, receiving certificate No. 2136470 on that date.

Sixth: Upon information and belief prior to the date of his naturalization, the defendant was a citizen of Italy.

Seventh: The order and certificate of naturalization were procured by wilful misrepresentation in that:

(a) In the preliminary form for naturalization filed by the defendant, he falsely stated that his occupation was "real estate", whereas in truth and in fact his occupation was the illicit purchase and sale of alcohol.

(b) He falsely testified under oath before a naturalization examiner that his occupation was "real estate",

whereas in truth and in fact, his occupation was the illicit purchase and sale of alcohol.

(c) He falsely stated under oath in his petition for naturalization that his occupation was "real estate", whereas in truth and in fact his occupation was the illicit purchase and sale of alcohol.

(d) He falsely stated in his preliminary form for naturalization that Harry C. Sausser, a witness that he intended to use, had as his occupation "real estate" and had personal knowledge of his good character, when in truth and in fact, as he then and there well knew, 1022 said Harry C. Sausser was engaged with him in the illicit purchase and sale of alcohol and knew that he, Frank Costello, was likewise engaged in the illicit purchase and sale of alcohol and was therefore not a person of good moral character.

(e) He falsely stated in his preliminary form for naturalization that the only other name by which he had ever been known was Francisco Castiglia, when in truth and in fact, as he then and there well knew, he had also used the names Frank Stello and Frank Saverio.

(f) He falsely stated under oath in his petition for naturalization that he would support and defend the Constitution and laws of the United States of America and that he would bear true faith and allegiance to the same, whereas in truth and in fact, he was at that very time violating the laws of the United States and the State of New York by engaging in the illicit purchase and sale of alcohol and by failing to file appropriate federal and New York state income tax returns and failing to pay appropriate federal and New York state income taxes, and intended to continue to violate the same.

(g) He falsely stated to the naturalization examiner under oath that he had never been arrested for or convicted of any crime, when in truth and in fact, as he then

and there well knew, he had been arrested on May 6, 1908, charged with robbery; on October 20, 1912, charged with robbery; on March 19, 1915, charged with unlawful possession of a firearm; and on May 20, 1919, charged with larceny; and had been convicted on April 5, 1915 of unlawful possession of a firearm and was sentenced on such conviction to one year in the State Penitentiary.

Eighth: The order and certificate of naturalization were procured by the concealment of material facts in that:

1023 (a) At the time of his appearance before the naturalization examiner for the purpose of answering questions under oath, he brought with him as a witness one Harry C. Sausser, whom he presented to the naturalization examiner as a person who had knowledge of his good moral character who was in the real estate business and concealed from the naturalization examiner the fact, which he then and there well knew, that said Harry C. Sausser was in fact engaged in the illicit purchase and sale of alcohol as his agent and that said Harry C. Sausser was well aware of Frank Costello's lack of good moral character.

(b) At the time Harry C. Sausser signed his petition for naturalization stating thereon that he was in the real estate business and that he knew Frank Costello to be a person of good moral character and attached to the principles of the Constitution of the United States of America, Frank Costello concealed the fact, which he then and there well knew, that said Harry C. Sausser was in fact engaged in the illicit purchase and sale of alcohol as his agent and knew him to be a person of bad moral character.

WHEREFORE, plaintiff demands judgment revoking and setting aside the order of this Court entered September 10, 1925, admitting the defendant Frank Costello to United States citizenship, and cancelling certificate of naturalization No. 2136470, issued by said Court to the defendant on

September 10, 1925, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, N. Y., May 1, 1958.

PAUL W. WILLIAMS,
*United States Attorney for the
 Southern District of New York;
 Attorney for Plaintiff.*

By: /s/ MORTON S. ROBSON
 Morton S. Robson,
Assistant United States Attorney.

Office & Post Office Address:
 United States Court House,
 Foley Square,
 New York 7, N. Y.

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EXHIBIT A.

STATE OF NEW YORK }
 SOUTHERN DISTRICT OF NEW YORK } ss.:

MITCHELL S. SOLOMON, being duly sworn, deposes and says:

I am a Supervisory Investigator for the Immigration and Naturalization Service.

In the course of my official duties, I conducted an investigation of the naturalization proceedings of one Frank Costello.

Attached hereto are photostatic copies of various documents obtained by me during the course of this investigation.

1. Certified copy of petition of Frank Costello for naturalization executed May 1, 1925, and order of the United States District Court for the Southern District of New York admitting Frank Costello to citizenship dated September 10, 1925.

2. Preliminary form for petition for naturalization from the files of the Immigration and Naturalization Service which was filed by Frank Costello.

3. Form 2328—admitted slip—obtained from the file of Frank Costello in the possession of the Immigration and Naturalization Service.

4. Certified copy of a complaint filed against Frank Costello on May 6, 1908, in the Magistrates' Court of the City of New York, Sixth District, First Division, charging said Frank Costello with robbery.

5. Certified copy of complaint filed against Frank Costello on October 20, 1912, in the Magistrates' Court of the City of New York, Fifth District, First Division, charging said Frank Costello with robbery.

6. Certified copy of an indictment filed against 1025 Frank Saverio on March 19, 1915, charging said

Frank Saverio with unlawful possession of a firearm in violation of Section 1897 of the Penal Law of the State of New York.

7. Certified copy of the minutes of sentence of aforesaid Frank Saverio on April 15, 1915, indicating that he also used the names Stello and Frank Costello.

8. Certified copy of complaint filed against Frank Costello on May 20, 1919, charging him with grand larceny.

MITCHELL S. SOLOMON (sgd)

Sworn to before me, this 22nd day of April, 1958.

DANIEL TANENBAUM

Notary Public, State of New York

No. 24-3930200 Kings County

Commission Expires March 30, 1959

(Attachments 1-3 printed at pp. 200-205 *infra*; attachments 4-8 omitted in printing.)

1055

EXHIBIT B.

STATE OF NEW YORK
 EASTERN DISTRICT OF NEW YORK } ss.:

LOUIS M. DILLON, being duly sworn, deposes and says:

From January or February, 1925 until 1955, I was employed by the United States of America as an examiner for the Naturalization Service.

Between April 1, 1925 and December 31, 1925, I was stationed at the New York office of the Naturalization Service, which was then located at 154 Nassau Street, New York, N. Y.

During that period, I was employed as a naturalization examiner and my duties included a processing of applications for naturalization. In the course of such processing I interviewed applicants for naturalization and their witnesses.

A standard procedure was followed in all cases of applicants for naturalization, and I am familiar with this procedure.

Every applicant who had filed a declaration of intention and who thereafter desired to be naturalized was required to file with the Naturalization Service an application form entitled "Preliminary form for Petition for Naturalization" (Form 2214).

Subsequent to the filing of this form, each applicant was required to appear in person, together with his two witnesses, before a naturalization examiner.

The applicant and his two witnesses were then sworn to tell the truth by the examiner. Thereupon they were questioned concerning various pertinent subjects. Among other things they were asked to give their occupation and also they were asked whether they had ever been arrested for any crime or convicted of any crime.

1056

The answers made to these questions were noted upon Form 2328, which was a card known as an admitted slip.

If an applicant advised in response to the question that he had been arrested for or convicted of a crime, an appropriate notation indicating that answer was made on the back of this slip.

I have examined the admitted slip prepared in the matter of Frank Costello, a copy of which is attached to the affidavit of Mr. Mitchell Solomon. This examination reveals that nowhere on this slip does there appear any notation indicating that Frank Costello advised the naturalization examiner that he had ever been arrested or convicted of a crime.

LOUIS M. DILLON (sgd)

Sworn to before me, this 22nd day of April, 1958.

PETER A. PASSALACQUA

Notary Public, State of New York

No: 24-3028800

Qualified in Kings County

Cert. filed with Kings & Queens Co. Reg.

Commission Expires March 30, 1959

1057

EXHIBIT C.

STATE OF NEW YORK }
SOUTHERN DISTRICT OF NEW YORK } ss.:

JAMES N. SULLIVAN, being duly sworn, deposes and says:

I was formerly employed as a Special Agent of the Internal Revenue Service.

On July 20, 1938, I questioned Frank Costello in New York City. On that occasion Frank Costello admitted that he had been in the liquor business during prohibition "from 1923 or 1924 until about a year or two before Repeal".

JAMES N. SULLIVAN (sgd)

Sworn to before me, this 18th day of April, 1958.

JULIUS ROLNITZKY

Notary Public, State of New York
No. 41-3334300 Queens County
Commission Expires March 30, 1959

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EXHIBIT D.

STATE OF NEW YORK }
SOUTHERN DISTRICT OF NEW YORK } ss.:

JOSEPH KAITZ, being duly sworn, deposes and says:

During the year 1947 I was a Deputy Commissioner of the New York State Liquor Authority.

In connection with an official investigation being conducted by the said Liquor Authority, I questioned Frank Costello under oath on February 15, 1947, in New York, N. Y.

At the time of that interview Frank Costello was accompanied by his counsel, George Wolfe, Esq.

During the course of the interrogation on February 15, 1947, Mr. Wolfe asked his client if he were engaged in bootlegging during prohibition, and Costello admitted that he had been so engaged during the years 1923 to 1926. Costello admitted that at that time he had been importing whiskey into the United States and selling it to individuals, and that he maintained his headquarters for this business at 405 Lexington Avenue, New York City. Costello also acknowledged that during prohibition he had a representative named "Harry Saucer" who acted as his agent in purchasing liquor in Canada.

JOSEPH KAITZ (sgd)

Sworn to before me, this
17th day of April, 1958.

BERTRAM D. SARAFAN
Notary Public, State of New York
No. 30-8765020
Qualified in Nassau County
Commission Expires March 30, 1960

1059

EXHIBIT E.

STATE OF NEW YORK }
SOUTHERN DISTRICT OF NEW YORK } ss.:

FRANK S. HOGAN, being duly sworn, deposes and says:

I am the District Attorney for the County of New York, State of New York, and have held that office since 1942.

In 1943, in connection with a proceeding pending before the Supreme Court of the State of New York, Appellate Division, First Department, entitled "In the Matter of Thomas A. Aurelio", I conducted an examination of Frank Costello.

During the course of this examination, I asked Frank Costello whether he had ever paid any income tax to the

State of New York or to the United States of America for the years 1919 to 1932.

Frank Costello stated that he had not paid any taxes to either the State of New York or the United States of America during those years, but that subsequently he had made a settlement with both the State of New York and the United States of America of his income tax liability for those years.

I also asked Frank Costello whether he had been convicted of a crime in 1915 and he admitted that he had been convicted of violation of the Sullivan Law and had been sentenced to jail, where he remained for ten months.

FRANK S. HOGAN (sgd)

Sworn to before me, this
21 day of April, 1958.

ROBERT F. WARD

Notary Public, State of New York
No. 41-4155500

Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1959

1060

EXHIBIT F.

Assistant Attorney General
Criminal Division

DEPARTMENT OF JUSTICE
WASHINGTON

April 28, 1958

Paul W. Williams, Esquire
United States Attorney
New York 7, New York

Re: *United States v. Frank Costello*

Dear Mr. Williams:

I have read the affidavits of Mitchell S. Solomon, executed April 22, 1958; Louis M. Dillon, executed April 22, 1958; James N. Sullivan, executed April 18, 1958; Joseph Kaitz, executed April 17, 1958; and Frank S. Hogan, executed April 2, 1958. I am satisfied therefrom that there is good cause to institute proceedings for the purpose of revoking and setting aside the order admitting Frank Costello to citizenship and canceling his certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of material facts and by willful misrepresentations.

You are accordingly authorized and directed by the Attorney General to file an appropriate complaint against Frank Costello pursuant to the provisions of Section 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1451(a).

Sincerely

MALCOLM ANDERSON (sgd)

Malcolm Anderson

Assistant Attorney General

1063.

Answer**FIRST DEFENSE**

The complaint fails to state a cause of action against defendant upon which relief can be granted.

SECOND DEFENSE

Defendant admits the allegations of paragraphs 4, 5; and 6 of the complaint and denies the allegations of paragraphs 7 and 8. The allegations of paragraphs 1, 2, and 3 of the complaint constitute legal conclusions which defendant is not required to answer.

THIRD DEFENSE

Any alleged claim set forth in the complaint is barred under principles of res judicata.

FOURTH DEFENSE

Any alleged claim set forth in the complaint is barred by laches.

FIFTH DEFENSE

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. § 1451(a), on its face and as applied to this defendant is invalid in that it constitutes ex post facto legislation and deprives him of rights guaranteed by Article III and the due process clause of the Fifth Amendment to the United States Constitution.

SIXTH DEFENSE

The complaint and the affidavits annexed thereto are based upon evidence secured in violation of § 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605.

/s/ EDWARD BENNETT WILLIAMS
Edward Bennett Williams
Office and Post Office Address
1000 Hill Building
Washington 6, D. C.

HAYS, ST. JOHN, ABRAMSON &
HEILBRON

By: /s/ MORRIS SHILENSKY
Morris Shilensky, a member of
the firm
Office and Post Office Address
120 Broadway
New York 5, New York

Attorneys for Defendant

Appearances:

ARTHUR H. CHRISTY, Esq., United States Attorney for the
Southern District of New York

MORTON S. ROBSON, Esq., Assistant United States At-
torney

JOHN A. GUZZETTA, Esq., Assistant United States At-
torney

Of Counsel

HAYS, ST. JOHN, ABRAMSON & HEILBRON, ESQs., of New
York, N. Y.

Attorneys for Defendant

EDWARD BENNETT WILLIAMS, Esq., of Washington, D. C.

Of Counsel

DAWSON, D. J.:

This is an action brought by the United States of Amer-
ica pursuant to the provisions of Title 8, United States
Code, § 1451(a)¹ to revoke and set aside an order of
1087 this court entered September 10, 1925 admitting the
defendant Frank Costello to United States citizen-
ship, and to cancel a certificate of naturalization issued to
this defendant, on the ground that said order and certifi-
cate of naturalization were procured by the concealment of
material facts and by willful misrepresentation.

The past history of this action bears mention. On Octo-
ber 22, 1952 the Government instituted denaturalization
proceedings against this defendant under § 338(a) of the
Nationality Act of 1940, 54 Stat. 1158, § 738 of old Title 8,

¹ 66 Stat. 260, 8 U.S.C. § 1451(a) reads in pertinent part:

"It shall be the duty of the United States attorneys for the respective
districts, upon affidavit showing good cause therefor, to institute proceedings
... for the purpose of revoking and setting aside the order admitting such
person to citizenship and cancelling the certificate of naturalization on the
ground that such order and certificate of naturalization were procured by
concealment of a material fact or by willful misrepresentation. . . ."

U.S.C.A. That action came on for trial before Judge Palmieri of this court in 1956.² Defendant's counsel moved to dismiss the action on the ground that both the affidavit of good cause and the Government's evidence were tainted by wiretapping. This contention was sustained by the court and the action was dismissed without prejudice to renew and upon certain conditions. *United States v. Costello*, 145 F. Supp. 892 (S.D.N.Y. 1956):

This judgment was subsequently reversed by the United States Court of Appeals for this circuit on the ground that even if the Government's affidavit of good cause was invalid as the fruit of illegal interceptions, the Government should have been permitted to file a new affidavit rather than have the case dismissed. *United States v. Costello*, 247 F.2d 384 (2d Cir. 1957). The Supreme Court 1088 granted certiorari and reversed the Court of Appeals on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint; it ordered that the complaint be dismissed. *Costello v. United States*, 356 U.S. 256 (1958). The Government, on May 1, 1958, instituted this action. It is brought under the provisions of § 340(a) of the Immigration and Nationality Act of 1952,² and an affidavit of good cause was filed contemporaneously with the complaint.

The basic facts underlying this action are not in dispute. Frank Costello was, prior to September 10, 1925, a citizen of Italy. On May 1, 1925 he filed a petition for naturalization in the United States District Court for the Southern District of New York. On September 10, 1925 he was admitted to citizenship and Certificate of Naturalization No. 2136470 was issued to him on that date. The Government contends that in more recent years facts have been discovered which indicate that Costello obtained his citizenship

² The Nationality Act of 1940 was superseded on December 24, 1952 by the Immigration and Nationality Act of 1952, commonly referred to as the McCarran Act, June 27, 1952, c. 477, Title III, Chap. 2, § 340, 66 Stat. 260, 8 U.S.C.A. § 1451.

by the concealment of material facts and by willful misrepresentation. Thus, this action was instituted.

The factual issue to be determined by this Court can be simply stated. It is whether or not the defendant 1089 did in fact obtain his citizenship by the concealment of material facts or by willful misrepresentation. If this question is answered in the affirmative, this Court must then examine the several important further legal questions propounded by the defense.

At the conclusion of the Government's case the defendant's attorney indicated that he would not present any witnesses in this action. The defendant moved to dismiss the complaint, resting upon the Government's presentation of evidence and the legal issues which he felt militated in his favor.

Before turning to the findings of fact and conclusions of law, a short review of the law of denaturalization is in order. Naturalization is one of the powers expressly granted by the states to the Federal Government. The Constitution, Article I, Section 8, Clause 4, provides that "The Congress shall have power . . . to establish an uniform Rule of Naturalization." Congress has from time to time exercised that power, established the rule and declared the manner of and the conditions under which an alien may be naturalized to become a citizen of the United States. Pursuant to this authority the first uniform rule of naturalization established by Congress was the Act of March 26, 1790. This basic act has been changed from time to time but it was not until the Naturalization Act of June 29, 1906 that the Act granted for the first 1090 time the authority to denaturalize. Section 15 of the 1906 Act directed United States district attorneys, upon affidavit showing good cause, to institute proceedings for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on

the ground that such certificate of citizenship was illegally procured.

It was early settled by the Supreme Court that it was constitutional to sue to revoke a judgment of naturalization for fraud or illegality, *Johannessen v. United States*, 225 U.S. 227 (1912), and it was also permissible for the Government both to protest the naturalization proceeding and, upon losing, bring suit to revoke a judgment. *United States v. Ginsberg*, 243 U.S. 472 (1917).

The 1906 Act remained basically unchanged with regard to denaturalization until the passage of the Nationality Act of October 14, 1940. This Act codified the Nationality and Naturalization laws of the United States, repealing generally all previous laws of this nature. The Act went into effect January 13, 1941, and § 15 of the 1906 Act was re-renewed as § 338(a)(b)(c)(d)(f) and (g) of the 1940 Nationality Act.

The next important change was the enactment of the Immigration and Nationality Act of 1952, which superseded the prior Act of 1940. The Act of 1940 had provided that the order admitting a person to citizenship might be revoked and set aside and the certificate of naturalization cancelled "*on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.*" Section 340(a) of the 1952 Act changed the grounds to read: "*on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation.*"

Thus, the basic difference between the denaturalization provisions of the new Act of 1952 and those of the prior Act of 1940 is that the prior Act provides as the ground for the bringing of a denaturalization action "fraud" or "illegal procurement." The new Act eliminates the second ground and provides for denaturalization only on the

ground of "concealment of a material fact" or "willful misrepresentation."—It has never been fully resolved as to whether or not the elimination of the ground of illegal procurement and the inclusion of the ground of concealment of a material fact makes the 1952 Act more stringent or less stringent. If the Government proceeds on the allegation of "fraud" it must introduce evidence that is "clear, unequivocal and convincing" and which does not leave "the issue in doubt" that the defendant has been guilty of fraud. *Maisenberg v. United States*, 356 U.S. 670 (1958); *Schneiderman v. United States*, 320 U.S. 118, 158 (1943); *Klapprott v. United States*, 335 U.S. 1092, 601, 612 (1949); *Baumgartner v. United States*, 322 U.S. 665 (1944); *United States v. Anastasio*, 226 F. 2d 912 (3d Cir. 1955).

This burden of the Government to establish clearly and convincingly its evidence is rightly based upon the concept that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943); *United States v. Meli*, 158 F. Supp. 217 (E.D. Mich. 1957). We are ever cognizant that denaturalization, like deportation, may result in the loss of all that makes life worth living. *Knauer v. United States*, 328 U.S. 654, 659 (1946). These truths led the courts to lay down the rule that "the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118 (1943); *United States v. Anastasio*, 226 F. 2d 912 (3d Cir. 1955); *United States v. Meli*, 158 F. Supp. 217 (E.D. Mich. 1957). There can be no dispute that our jurisprudence requires a solidity of proof which leaves no troubling doubt when a court decides a question of such gravity as is implied in an attempt to reduce a person from the status of citizen to that of alien. *Baumgartner v. United States*, 322 U.S. 665, 670 (1944); *United States v. Anastasio*, 226 F. 2d 912 (3d Cir. 1955).

Thus, viewing the development of the law and the heavy burden and great responsibility imposed upon the Government in enforcing the denaturalization aspect of our 1093 laws, this court has given exceedingly careful consideration and weight to every allegation and defense. The contentions of the Government, plus the burden of evidence and the findings of fact are discussed seriatim below.

The Government contends that the naturalization order and certificate were procured by willful misrepresentation or concealment of material facts in seven (7) respects which are itemized in the complaint. The Court finds that two of the allegations have been established as constituting willful misrepresentation and fraud.

1. That the defendant stated that his occupation was "real estate" whereas his true occupation was bootlegging.

2. That the defendant swore in his oath of allegiance to the United States, on September 10, 1925, that "I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same;" whereas at the time the defendant was actually engaged in a course of activity which flouted the Constitution of the United States and was designed to violate the laws of the United States.

On the same day that Costello took this oath of allegiance, Judge Thacher, a judge of this court, in consideration of the petition executed by Costello, and, having found that defendant had taken the oath required 1094 by law, admitted the defendant to United States citizenship. Can there be any doubt that, if Judge Thacher had known at that time that the occupation of the defendant, at that time, was not "real estate" but "bootlegging," and that far from defending the laws of the United States the defendant was engaged in a series of extensive activities designed to flout those laws, he would

have refused to admit Costello to citizenship? Lest there be any doubt on the subject, we must keep in mind that Judge Thacher himself decided, the following year, that one who deliberately violated the Eighteenth Amendment to the Constitution "cannot be said to be attached to the principles declared by that Amendment," and denaturalized an alien who during the preceding five years had been convicted of violation of the prohibition laws. *United States v. Mirsky*, 17 F. 2d 275 (D.C. N.Y. 1926).

The question as to whether the answers given by the defendant and the oath taken by him were false might be more difficult to determine if it were not that defendant himself has admitted the facts in sworn testimony given by him in various legal interrogations in more recent times.

Thus, in a statement given to Special Agent James N. Sullivan of the Intelligence Unit on July 24, 1938, the defendant Costello was asked the following questions and gave the following answers:

1095 "Q. Did you have anything to do with the liquor business during the Prohibition era—that is, say, from 1920 to 1933?

A. Yes.

Q. During what period of time?

A. Oh, until about—I will say from 1923 or 1924 until a year or two before repeal."

Costello was questioned by District Attorney Hogan before a New York County Grand Jury in 1943 in connection with an investigation into judicial nominations in New York County. He admitted that he had "got large sums of money" from bringing in whisky during prohibition. He was asked the following questions and gave the following answers:

"Q. That is true, you were in the bootlegging business, weren't you?

A. Yes.

Q. And you did smuggle whisky into the country?

A. Yes."

He admitted that he had reported to the State Tax authorities that for the years 1919 to 1932 his income totalled \$305,000, and that most of it was made in the bootlegging business.

He was then asked about his interest in real estate, and gave the following answers:

"Q. Did you have any other occupation in those years?

A. Well, I was doing a little real estate at that time.

1096 Q. Did you ever make any money in real estate?

A. Well, made some moneys, yes.

Q. Not very much was it? Do you recall any particular real estate transaction in which you made any money?

A. Well, I had bought a building on West End Avenue and 92nd Street.

Q. Yes.

A. And I believe I made a little money there.

Q. How much would you say?

A. Well, I would say maybe \$25,000.

Q. On the sale of that building?

A. Yes.

Q. Did you take it in your name or in the name of a corporation?

A. Well, I think it was a corporation at the time.

Q. Do you remember the name of it?

A. I think it was Koslo.

Q. You contend on the sale of that property you profited to the extent of \$25,000?

A. I think so, about twenty or twenty-five thousand dollars. I just don't remember so far back.

Q. How much did you pay for the property?

A. I think we paid about \$125,000, I believe.

"Q. Who was associated with you in the purchase of it?

1097 A. I can't think of his name right now.

Q. How much of the \$125,000 was yours?

A. I had 50 per cent of it.

Q. So that would be \$62,500?

A. Yes. I think we put up about thirty and then we sold it before we even closed.

Q. Whatever you put up was proceeds of the liquor business, isn't that right?

A. It might have been gambling or liquor.

Q. Gambling and liquor?

A. I can't distinguish money from the liquor."

Furthermore, Costello gave testimony before a Referee appointed by the Appellate Division of the New York Supreme Court in a matter relating to the election of a Supreme Court justice in New York, during which he was asked the following questions and gave the following answers:

"Q. You were in the bootlegging business, weren't you?

A. I was.

Q. You smuggled whiskey into the country?

A. Yes.

Q. And your income was pretty heavy in those years, wasn't it?

A. Well, it was profitable."

1098 The Government also presented the testimony of certain individuals who had been associated with the bootlegging activities of Costello during 1925 and prior hereto. One witness, Emanuel Kessler, testified as to how, after the passage of the Eighteenth Amendment, he went into the bootlegging business. He acquired a half dozen boats, including an ocean-going vessel, which transported whisky from Europe to a location off the end of Long Is-

land where the whiskey was landed at night by means of the smaller boats. He entered into an arrangement with Costello and his brother to transport the illicit, smuggled merchandise from the end of Long Island to Astoria in New York City and there store it in premises owned and occupied by the Costellos. Kessler advanced the money to Costello to buy the trucks to transport this smuggled liquor. On an average, 6,000 cases of whisky were so transported every week, which Kessler thereafter sold at about \$50 a case. He testified that he was doing a business amounting to fifteen million dollars a year. Thereafter Kessler was convicted of violating the prohibition laws and served a two year prison term. In 1928 he was indicted for income tax evasion.

The Government had other witnesses who testified as of their personal knowledge to Costello's participation in bootlegging activities during this period. If the Government rested on the testimony of the individual witnesses it might be necessary to appraise their evidence more carefully, but in view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto he was engaged in bootlegging, the testimony of the individual witnesses is, if anything, merely cumulative.

What then is the evidence as to Costello's participation in the "real estate" business during this period? A check of the real estate records from 1921 to 1925 in New York, Bronx, Kings and Queens Counties shows that there was only one real estate transfer in which he participated in his individual name. He was, however, a principal in a concern known as Koslo Realty Corporation, which was formed on December 1, 1924 and which, on the same date, purchased a parcel of real estate on West End Avenue in New York City and sold it the following June 22nd. Thereafter, and after Costello had been naturalized, Koslo Realty Corporation engaged in three other real estate transactions. Thus we have the situation, so far as

the records indicate, that prior to the time that Costello had sworn that his occupation was "real estate" he personally had engaged in only one real estate transfer in his own name; and the corporation in which he was a principal engaged in ~~only~~ one transaction and that to the extent of purchasing one parcel of real estate. During the same period, as the evidence shows and

1100 as Costello has admitted, he was actively engaged in bootlegging on a large scale and with very profitable results. If a man in that situation had been honest when asked what his occupation was, would he have answered "real estate?" If he had told the truth he probably would not have been naturalized, but this is no excuse for him using fraud and deceit to secure his naturalization. The term "occupation" would commonly be understood to refer to the income producing activity to which a person devotes the major portion of his time and from which he derives the major portion of his income. Defense counsel seems to urge that when the Government asked for the "occupation" of the applicant for citizenship it was asking him to state his "legal occupation." This is a far-fetched hypothesis. Obviously if he were engaged in an illegal occupation the Government would like to know that to determine whether he properly should be admitted to citizenship. Costello, confronted with the question and the fact that his occupation was an illegal one, had one of two choices in giving his answer. If he had told the truth he would have said that his occupation was bootlegging; his application for citizenship would then have been denied. When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaging in a willful misrepresentation in order to secure his naturalization certificate.

1101 The Court Finds:

1. That commencing several years prior to May 1, 1925 and during the period from May 1, 1925 to September 10,

1925, and for several years thereafter, Costello was actively and extensively engaged in the occupation of smuggling, trucking, storing, purchasing and dealing in alcoholic beverages in violation of the law.

2. The real occupation of Costello at the time that he applied for naturalization and was admitted to naturalization was not "real estate" but was bootlegging.

3. That when Costello answered the question on the application for citizenship by stating that his occupation was "real estate" he was making a fraudulent statement and a willful misrepresentation in order to secure naturalization.

4. That when defendant in his petition for naturalization and in his oath of naturalization swore that he was attached to and would support the Constitution and laws of the United States, he was engaged in extensive activities in violation of the laws of the United States and contrary to the Constitution of the United States, and that the answers which he gave on his petition for naturalization, and his statement in his oath of naturalization, were false, fraudulent and misleading.

The Court concludes that Costello secured his naturalization by concealment of material facts and by willful misrepresentation. An application to become a United States citizen is a serious matter and is entitled to be treated with more respect than an application to join the corner pinochle club. An oath of allegiance to the United States is an oath to support the Constitution and laws of the United States, and is, and should be, a solemn obligation. It would be a sad day for the Republic if such an oath could be taken with fingers crossed and tongue-in-cheek, as apparently was done by Costello. The willful misrepresentations and active concealment in which Costello engaged were of a nature which would warrant an order directing his denaturalization.

The Government has urged various other grounds for denaturalization, including other alleged misrepresentations and fraudulent concealment. The Court is not convinced that they have been established by that requisite degree of proof needed in an action of this nature, but in view of the conclusion of the Court, hereinabove stated, there would seem to be no necessity to analyze them with respect thereto in any detail.

At the time of Costello's naturalization the fourth subsection in Section 4 of the 1906 Act provided:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he resided continuously within the United States five years at least; and within the State or Territory where such court is at the time held one year at least, and that during that time has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same"

The courts have held that violations of the prohibition liquor laws, whether national or state, should be taken into consideration in determining questions respecting the good moral character of applicants for citizenship and their attachment to the principles of the Constitution of the United States. *United States v. De Francis*, 60 App. D.C. 207, 50 F. 2d 497 (1931); *Ex Parte Elson*, 299 F. 352 (D.C. W.D. Texas 1924); *In Re Bonner*, 279 F. 789 (D.C. D.Mont. 1922).

The oath an applicant for citizenship takes when admitted is not only one of renunciation of allegiance and fidelity to the sovereignty of his former citizenship, but the applicant also pledges himself to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic and to bear truth [sic] faith and allegiance to the same.

This court, in *United States v. Mirsky*, 17 F. 2d 275 (S.D. N.Y. 1926), had before it an alien who during the period of five years before he had been admitted to citizenship had been convicted of violating the Eighteenth Amendment. This court granted the decree of cancellation of the certificate of naturalization holding,

1104 "The statute requires, as a prerequisite to naturalization, that it shall be made to appear that during the probationary period of five years immediately preceding the application the alien 'has behaved as a man of good moral character, attached to the principles of the Constitution of the United States' . . . One who deliberately violates the Eighteenth Amendment to the Constitution cannot be said to be attached to the principle declared by that amendment. *In Re Nagy* (D.C.) 3 F.2d 77; *In Re Raio* (D.C.) 3 F.2d 78; *In Re Phillips* (D.C.) 3 F.2d 79; *Ex Parte Elson* (D.C.) 299 F. 352; *In Re Bonner* (D.C.) 279 F. 789

"Neither the fact that in this and in other communities there are many citizens who are not attached in thought or deed to the principle embodied in the Constitution by the Eighteenth Amendment, nor the fact that opposition to that principle with a view to removing it from the Constitution is quite generally thought to be the part of good citizenship, can relieve this court of its duty to apply the law as it is now written.

"Motion for judgment is granted. . . ."

The Eighth Circuit had before it in *Turlej v. United States*, 31 F. 2d 696 (8th Cir. 1929) the review of a lower court order cancelling a certificate of naturalization for fraud on the ground that before the certificate was granted the applicant had violated the liquor laws. The Eighth Circuit in upholding the cancellation discussed the fact that the violation of the Eighteenth Amendment clearly dem-

onstrated that the applicant could not be a man of good moral character attached to the principles of the Constitution. The court said:

1105 " . . . It is an act of Congress to administer the new principle of the federal Constitution, prohibition. All this is new and known of all men. Hence violation of it is consciously and deliberately in subversion of the principles of the Constitution, and to which it must be proven the applicant is attached, before admitting him to citizenship . . . It is not enough to be attached to some of the principles of the Constitution. There must be proof of attachment to all of them, including that of prohibition. Violating this law breeds disorder and unhappiness, and in circumstances here indicates the offender is not 'well disposed to the good order and happiness' of nation and people."

In *United States v. De Francis*, 50 F. 2d 497 (D.C. Cir. 1931) the Court of Appeals reversed the lower court's dismissal of a petition for cancellation and indicated that one who violated the National Prohibition Act could not be attached to the principles of the Constitution. The court stated that in order for an alien to avail himself of the privilege of citizenship he must comply with the laws requiring good moral character.

The court indicated that had the naturalization court known of the violations of the prohibition laws the applicant would not have been admitted to citizenship.

The Court stated:

"Any person who violates the provisions of the Prohibition Act violates the principles of the Constitution of the United States, and cannot be held to be attached to the principles of the Constitution of the United States. Nor can it be said that such a person possesses good moral character. Evidence showing the lack of

good moral character is ground for cancellation of
 1106 a certificate. *United States v. Mirsky* (D.C.) 17 F.
 (2d) 275; *Turlej v. United States* (C.C.A.) 31 F.
 (2d) 696, 699; *United States v. Leles* (D.C.) 236 F.
 784; *United States v. Raverat* (D.C.) 222 F. 1018;
United States v. Wexler (D.C.) 8 F.(2d) 880; *United*
States v. Unger (D.C.) 26 F.(2d) 114."

In *United States v. Villaneuva*, 17 F. Supp. 485 (D.C. Nev. 1936) the plaintiff's complaint asked that the decree of a certificate of naturalization issued to the defendant be set aside and cancelled in that the naturalization was fraudulently procured since when his petition was filed and granted he was not attached to the principles of the Constitution and did not intend to support the laws of the United States. The Government alleged that both before and after the naturalization the defendant had been involved in the violation of the National Prohibition Act. The court granted an order setting aside the certificate of naturalization, stating,

"Courts have quite universally held that violations of prohibition liquor laws, whether national or state, should be taken into consideration in determining questions respecting the good moral character of applicants for citizenship and their attachment to the principles of the Constitution of the United States. Title 8 U.S.C.A. § 382; *United States v. De Francis*, 60 App. D.C. 207, 50 F.(2d) 497; *United States v. Mirsky* (D.C.) 17 F.(2d) 275, 276; *Ex parte Elson* (D.C.) 299 F. 352; *In re Raio* (D.C.) 3 F.(2d) 78; *In re Bonner* (D.C.) 279 F. 789; *In re Trum* (D.C.) 199 F. 361; *United States v. Leles* (D.C.) 236 F. 784; *United States v. Gerstein*, 284 Ill. 174, 119 N.E. 922, 1 A.L.R. 318."

1107 With reference to the fact that the litigation occurred after the prohibition amendment had been repealed, the court brushed aside the contention that it could not act because of the repeal, stating,

"... The fact that the Eighteenth Amendment has been eliminated, the National Prohibition Act repealed, and thus the particular offenses of which the defendant was adjudged guilty are no longer offenses against the Constitution and laws of the United States, does not present a substantial reason why the case of defendant in this proceeding should now be regarded in the light of existing laws rather than the law as existing at the time of his admission, and for a time both prior and subsequent thereto.

"It is therefore the conclusion of the court that defendant's certificate of naturalization should be set aside. . . ."

The findings of fact indicate that the defendant was engaged in violating the Eighteenth Amendment and laws passed pursuant thereto within five years of his naturalization and at the time of his naturalization. The Court concludes that Costello's willful misrepresentation and concealment of material facts, as noted above, and his false oath of allegiance, constituted a fraud upon this court and merit the cancellation of the naturalization decree.

1108 It is now necessary to consider other points raised by defendant's able and astute counsel. Defendant contends that the repeal of the Eighteenth Amendment and of the National Prohibition Laws constitute a bar to a consideration of violations of those provisions when they were in effect, urging that since the Twenty-first Amendment took effect on December 5, 1933 it is settled that no action, civil or criminal, can be maintained which has for its basis violation of the National Prohibition Laws. It should perhaps be pointed out that the basis of the present decision is not that Costello violated the National Prohibition Laws; the basis of the decision is the false representation made by Costello as to his attachment to the principles of the United States Constitution and the laws of the United States.

The Eighteenth Amendment and the National Prohibition Act were in effect in 1925 and the years immediately prior thereto. It was Costello's flagrant and contemptuous disregard of the laws and the provisions of the Constitution which cast doubt on Costello's veracity when he swore his allegiance to the Constitution and pledged himself to uphold the laws of the United States. He must have been referring to the Constitution and to the laws as they were at the time he took his oath. His conduct showed that in making the declaration in the required oath he was making a fraudulent statement; and the later repeal of the prohibition laws cannot erase his fraudulent conduct as it existed at the time he was naturalized. See *United States v. Villaneuva*, supra.

1109 Defendant's counsel further contends that the dismissal of the prior denaturalization proceeding is a bar to this action. That action was dismissed by the Supreme Court on the ground that "an affidavit of good cause is a prerequisite to the initiation of denaturalization proceedings. The affidavit must be filed with the complaint when the proceedings are initiated." 356 U.S. at p. 257. Defendant's counsel urges that under Rule 41(b) of the Rules of Civil Procedure this dismissal operates as a final adjudication and constitutes a bar to further proceedings to denaturalize the defendant. The Court cannot agree with this contention. The rule provides that a dismissal, "other than dismissal for lack of jurisdiction or improper venue" operates as an adjudication on the merits. The most that can be drawn from the decision is that the Supreme Court, in directing the dismissal of the first proceeding, was stating that unless an affidavit of good cause is filed with the complaint the United States Attorney has no jurisdiction to proceed with the denaturalization proceedings. It was dismissing the action for failure to comply with what it deemed to be a jurisdictional requirement. It was not determining the action on the merits, nor did it purport to dismiss the ac-

tion on the merits. The dismissal decree did not operate as *res judicata* so far as the present action is concerned, where the proper affidavit was timely filed and where different grounds of relief were urged by the plaintiff.

1110 Defendant's attorney has also raised the issue of *res judicata*, predicated this defense on the premise that the order of naturalization of September 10, 1925 constituted a valid judgment between the parties determining the issues presented by this action.

It is well established that the doctrine of *res judicata* cannot be asserted against the Government so as to bar or preclude it from instituting and maintaining a statutory proceeding to set aside and cancel a certificate of citizenship on the ground of fraud. Every certificate of citizenship must be treated as granted on condition that the Government may challenge it in a separate proceeding as required by statute and demand its cancellation, unless it was issued in accordance with statutory requirements. *Knauer v. United States*, 328 U.S. 654 (1946); *Maney v. United States*, 278 U.S. 17 (1928); *United States v. Ascher*, 147 F.2d 544 (2d Cir. 1945); *United States v. Gokhale*, 26 F.2d 360 (2d Cir. 1928); *United States v. Javier*, 22 F.2d 879 (D.C. Cir. 1927); *United States v. Ali*, 20 F.2d 998 (E.D. Mich. 1927); *United States v. Jerome*, 115 F. Supp. 818 (S.D.N.Y. 1953); *United States v. Lustig*, 110 F. Supp. 806 (S.D.N.Y. 1953); *United States v. Gallucci*, 54 F. Supp. 964 (D. Mass. 1944); *United States v. Marini*, 16 F. Supp. 963 (S.D.N.Y. 1936); 3 C.J.S., *Aliens*, § 154 (Pocket Supp. 1958).

1111 In *United States v. Parisi*, 24 F. Supp. 414, 420 (D. Md. 1938), an action to cancel defendant's certificate of citizenship, the defense contended that *res judicata* as a doctrine applied to the action. The court rejected this contention stating:

"... Nor is there any doubt now, after recent decisions of the Supreme Court, that the certificate of citizen-

ship based on the naturalization order may be directly attacked by the Government under the special procedure provided for in 8 U.S.C.A. § 405 taken in this case. Naturalization procedure is judicial in character and is not subject to collateral attack; but is not *res judicata* to the extent that it is immune from direct attack in this special proceeding authorized by Congress. *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066; *United States v. Ness*, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321; *United States v. Unger*, D.C., 26 F.2d 114; *United States v. Javier*, 57 App. D.C. 303, 22 F.2d 879. . . .”

In *United States v. Unger*, 26 F.2d 114, 116 (S.D.N.Y. 1928), likewise an action to cancel and set aside a decree of citizenship, the court rejected the defense of *res judicata* stating:

“A decree of the state court or of the United States District Court granting citizenship is not *res judicata*, nor is the United States estopped by such decree, although it entered its appearance in the proceeding and unsuccessfully raised the same question. The proceeding under section 15, which provides for a suit in equity being brought by the district attorney to cancel a certificate of naturalization, is not in a
1112 strict sense an appeal, but is in the nature of an added or cumulative remedy for correcting an error in the original proceeding. *United States v. Ness*, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321; *United States v. Ginsberg*, *supra*; *Tutun v. United States*, 270 U.S. 568, 46 S.Ct. 425, 70 L. Ed. 738; *Johannessen v. United States*, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066.”

For these reasons the defense of *res judicata* is not valid.

The defendant also contends that because of the period of time which has elapsed between the granting of the certificate of naturalization and the date of this action,

the Government is guilty of laches and is estopped from bringing this action. The United States Supreme Court in *United States v. Summerlin*, 310 U.S. 414, 416 (1940) has clearly and concisely set the rule when it said,

"It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States v. Thompson*, 98 U.S. 486; *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125, 126; *Stanley v. Schwalby*, 147 U.S. 508, 514, 515; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132; *Board of Commissioners v. United States*, 308 U.S. 343, 351."

Laches, or lapse of time, cannot be pleaded against the Government in proceedings to cancel a certificate of naturalization. *United States v. Orth*, 51 F.Supp. 682, *reversed on other grounds*, 142 F.2d 969 (4th Cir. 1944); *United States v. Marino*, 27 F. Supp. 155, 156 (S.D. 1113 N.Y. 1939); *United States v. Spohrer*, 175 F. 440, 448 (D. N.J. 1910); 3 C.J.S., Aliens, § 157 (Pocket Supp. 1958); CABLE, *Loss of Citizenship, Denaturalization*, p. 60.

The test is not the length of time between naturalization and filing the proceeding to cancel; the test is whether the certificate in its inception was fraudulently procured. If so, an action to cancel may be filed any time after naturalization. It has been held that the defense of laches was not available in a proceeding by the Government to cancel a certificate of citizenship. *United States v. Schneiderman*, 33 F. Supp. 510, *aff'd*, 119 F. 2d 500, *reversed and vacated on other grounds*, 320 U.S. 118 (1943). There are instances of cancellation of certificates of naturalization after a period as great as thirty-five years. *United States v. Wursterbarth*, 249 F. 908 (D. N.J. 1918).

In *United States v. Reinsch*, 50 F. Supp. 971 (W.D. Wash.) *reversed on other grounds*, 156 F. 2d 678 (9th Cir.

1945), an action to cancel the naturalization of the defendant, the lower court held that though thirty-one years had elapsed since the defendant was admitted to citizenship, this lapse of time did not bar a proceeding to denaturalize him. The court stated:

"That the lapse of time does not bar the Government in this type of proceeding has been established by a number of cases. See *United States v. Wursterbarth*, D.C.N.J., 249 F. 908; *United States v. Darmer*, D.C. Wash., 249 F. 989; *Schurmann v. United States*, 9th Cir. 264 F. 917; 18 A.L.R. 1182; *United States v. Herberger*, D.C. Wash. 272 F. 278."

1114 In *United States v. Ali*, 7 F. 2d 728, 730 (E.D. Mich. 1925), an action for the cancellation of a certificate of citizenship, defendant maintained that laches was a defense. In this denaturalization action the court stated:

"The contention of the defendant that the right of the government to maintain this suit is barred by lapse of time is equally without merit. It is not, and cannot be, claimed that there is any applicable statute of limitation; and it is elementary that the doctrine of laches does not apply as against the government, when suing in its capacity as a sovereign and asserting governmental rights. *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S. Ct. 407, 63 L.Ed. 889."

In *United States v. Cufari*, 120 F. Supp. 941, 943 (D. Mass.), vacated on other grounds, 217 F. 2d 404 (1st Cir. 1954) the lower court, per Wyzanski, J., had before it the defendant's contention that laches applied in a denaturalization action. The court dismissed this defense, stating:

"If laches were relevant in a proceeding of this nature, brought by the United States, the burden

of proving it would be upon the defendant. Neither from him nor from any other source does it appear when the United States learned of this fraud, nor whether it moved expeditiously thereafter. So there is no factual foundation for the plea of laches. Moreover, there is no legal foundation. The Brenci case (where a delay of two decades occurred) shows that laches is not a defense in this type of proceeding brought by the sovereign."

It therefore appears that the defense of laches cannot be sustained.

1115 Finally defendant's counsel contends that evidence in this case is tainted by wiretapping and cannot be considered by this Court. It should be pointed out, at the outset, that no wiretaps have been used in evidence in this case nor would they have been admitted if offered. What defendant urges, in essence, is that the Government learned of Costello's bootlegging activities by means of wiretaps and that statements made by Costello before investigating authorities, to which reference has been made, were the result of inquiries started as a consequence of wiretapping.

There can be no doubt that, from time to time and over a period of years, law enforcing agencies did tap Costello's telephone wires and probably illegally, in view of the decision in *Benanti v. United States*, 355 U.S. 96 (1957). The extent to which the *Benanti* decision goes is still not clear. See, BROWN & PEER, "*The Wiretap Entanglement: How to Strengthen Law Enforcement and Preserve Privacy*," 44 Cornell L.Q. 175, 181 (1959).

However, not even Costello's ingeniously alert counsel went so far as to contend that the fact that Costello's wires had been tapped gave him immunity for past illegal activities. Therefore, a determination of his objections to the evidence which was offered must be considered in the light of the particular evidence. In each case we must examine the record to see if wiretap evidence was presented.

1116 or if the evidence was obtained indirectly as a result of illegal wiretaps. See *Nardone v. United States*, 302 U.S. 379 (1937) and 308 U.S. 338 (1939). No wiretaps were introduced in evidence in the present proceeding.

The most that can be contended is (1) that the Government learned of Costello's participation in bootlegging by tapping wires at his place of business in the period preceding 1925; and (2) that the interrogation of Costello by the New York City Grand Jury was precipitated by information obtained by District Attorney Hogan as a result of wiretaps on Costello's home telephone.

So far as the early wiretapping is concerned the testimony showed that in the period prior to 1925 the United States Attorney in New York was conducting an investigation of bootlegging activities of a number of persons, including Costello, and that in the course of the investigation certain telephones leading to 405 Lexington Avenue, where Costello had an office, were tapped. The Assistant United States Attorneys in charge of the investigation were: John M. Harlan, now a Justice of the United States Supreme Court; William E. Stevenson, now President of Oberlin College and Herman Stichman, now Trustee of the Hudson & Manhattan Railroad Company. Mr. Stichman and Mr. Stevenson both testified in the trial before me. Their testimony was clear and uncontradicted, and accepted

1117 as true by the Court, that the Government's information as to the bootlegging activities of Costello was not derived from telephone conversations but was derived from statements of certain individuals acquainted with the defendant's activities. The wiretapping was done to get other information but apparently produced no real results. Thereafter Costello was indicted and tried for violation of the prohibition laws. That trial resulted in a hung jury and the indictment was later nolle prossed. It cannot be concluded that the evidence on which the Government brought the present denaturalization proceeding was the fruit of the tap on Costello's wires in those early days.

So far as the relationship of wiretapping to the statements made by Costello before the New York Grand Jury is concerned, the facts are clear. It appears that Mr. Hogan, the District Attorney of New York County, in connection with his law enforcing activities, secured an order in accordance with New York State law permitting him to tap the home telephone of Costello in 1943. In the course of the tapping of this telephone a conversation was intercepted between Costello and one Thomas Aurelio, who had just received a bi-partisan nomination for the New York Supreme Court in which Aurelio thanked Costello for his assistance in getting him the nomination. The District Attorney instituted a Grand Jury investigation as to the circumstances of the nomination, which later led to an investigation of this Aurelio incident before a Referee

1118 appointed by the Appellate Division of the Supreme Court. While it was the intercepted telephone conversation between Costello and Aurelio which precipitated these investigations, this intercepted conversation had no relationship to any bootlegging activities of Costello. The only wiretaps used by the District Attorney covered a period beginning late in 1942 and extending into 1943. When the District Attorney had Costello before the Grand Jury he questioned the defendant about his activities during the years 1920 to 1930 because, as he said, "I wanted to present to the Grand Jury as much as I could with reference to his background . . . I thought the Grand Jury was entitled to know as much as I could present to it about the witness in order to make a judgment with respect to his testimony."

The proposition of the defendant seems to be that because the investigation was precipitated by an intercepted telephone conversation on a purely collateral matter, nothing he said about his criminal activities in other fields could thereafter be used. This would extend the principle of the second *Nardone* case far beyond what the Court determined. It would mean that a man whose telephone had been tapped would be granted immunity for any admissions

which he thereafter made, not in the telephone conversations but in answer to any questions in a later investigation. There is no basis for extending the rule to this degree.

1119 The evidence received in this case was not wiretap evidence nor was it the fruit of wiretap evidence. The objections of defendant to the evidence which was received and considered by this Court are overruled.

It must be kept in mind that the Government is not seeking to denaturalize Costello because he was a bootlegger, or to impose sanctions on him because he was a bootlegger in 1925. The purpose of the action is to restore the citizenship status *quo* as it existed prior to September 10, 1925, on the ground that any change in that status was accomplished by defendant by fraud and the concealment of material facts.

CONCLUSIONS

The Court concludes:

1. This Court has jurisdiction over the person of the defendant and over the subject matter of this action.

2. This action was properly commenced pursuant to the provisions of § 340(a) of the Immigration and Nationality Act of 1952, as amended; 8 U.S.C. § 1451(a).

3. The naturalization of the defendant Costello was induced by the concealment by him of material facts and by fraudulent misrepresentation of facts by him; and if the true facts had been revealed or known defendant's petition for naturalization would have been denied.

4. That the decree of the court, dated September 10, 1925, naturalizing the defendant Costello, and the certificate issued pursuant thereto, was secured as a result of the concealment of material facts, willful misrepresentation and fraud, and that judgment should therefore be vacated, cancelled and set aside by this Court.

1120

Judgment is therefore granted revoking and setting aside the order of this court entered on September 10, 1925, admitting the defendant Frank Costello to citizenship, and cancelling Certificate of Naturalization No. 2136470 issued by this court to the defendant Frank Costello on September 10, 1925.

This opinion constitutes the findings of fact and conclusions of law of the Court.

Let judgment be entered accordingly.

Dated: New York, N. Y.
February 20, 1959

/s/ ARCHIE O. DAWSON
U. S. D. J.

1121

Supplemental Judgment

The above entitled action having come on for trial before me, and an opinion having been filed wherein judgment was granted in favor of the plaintiff, UNITED STATES OF AMERICA, it is

Now on motion of ARTHUR H. CHRISTY, United States Attorney for the Southern District of New York, attorney for the plaintiff,

ORDERED AND ADJUDGED that the order of the United States District Court for the Southern District of New York entered September 10, 1925, admitting the defendant, Frank Costello, to citizenship of the United States of America, be and the same hereby is vacated and set aside; and it is further

ORDERED AND ADJUDGED that the certificate of naturalization which was issued to the defendant by said Court on September 10, 1925, be and the same hereby is cancelled; and it is further

ORDERED AND ADJUDGED that the defendant is not and never was a naturalized citizen of the United States of America and is not entitled to any of the rights or privileges of such citizenship; and it is further

ORDERED that the defendant surrender the aforesaid certificate of naturalization to the Immigration and Naturalization Service, United States Department of Justice; and it is further

ORDERED that the Clerk of this Court transmit a certified copy of this judgment, together with the aforesaid certificate of naturalization, if surrendered, to the Immigration and Naturalization Service, United States Department of Justice, Washington, D. C.

Dated: New York, N. Y., March 9, 1959.

/s/ ARCHIE O. DAWSON

United States District Judge

1123

Notice of Appeal

PLEASE TAKE NOTICE that FRANK COSTELLO, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of this Court entered in this action on March 9, 1959, adjudging that defendant's certification of naturalization be cancelled and that he is not a citizen of the United States, and from the whole of said judgment as well as every part thereof.

Dated: April 17, 1959

EDWARD BENNETT WILLIAMS
HAYS, ST. JOHN, ABRAMSON & HEILBRON
By: MORRIS SHILENSKY

A Member of the Firm
Attorneys for Defendant
Office & P. O. Address
120 Broadway
New York 5, N. Y.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

Before:

HON. ARCHIE O. DAWSON,
District Judge.

New York, December 11, 1958
10:30 o'clock a.m.

Appearances:

ARTHUR H. CHRISTY, Esq., United States Attorney, for the Plaintiff;

By Morton S. Robson, Esq., and John A. Guzzetta, Esq., Assistant United States Attorneys.

MRS. ST. JOHN, ABRAMSON & HEILBRON, Esqs., Attorneys for Defendant;

Edward Bennett Williams, Esq., (Washington, D. C.), Vincent Fuller, Esq., and Morris Shlensky, Esq., of Counsel.

88

Frank S. Hogan

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson:

Q. Mr. Hogan, you are the District Attorney of New York County? Is that correct? A. Yes, sir.

Q. You have been District Attorney since 1941? Is that correct? A. January 1, 1942.

Q. 1942. I am sorry. Mr. Hogan, in 1943, did you have occasion to interrogate before the Grand Jury and before the Appellate Division, First Department, of New York, one Frank Costello? A. I did.

89 Q. Talking now about the interrogation before the grand jury, what was that interrogation in connection with, that is, as part of an investigation? A. It was part of an investigation being conducted by my office at the time.

Q. What was, very briefly, the purpose of that investigation? A. It had a broad purpose. It was related to an investigation of the judicial nomination.

Q. Was there a judicial nomination current at that time, that is, was it a recent nomination that you were concerned with? A. Yes.

Q. That was a nomination in 1943? A. Nomination made at a judicial convention in the fall of 1943.

Q. Was that investigation in any way concerned with any activities of any persons, Frank Costello, or otherwise, which took place in 1920 or prior to 1930? A. No.

Q. Now, at the time of this interrogation were you in the possession of any transcriptions or recordings of telephone conversations? A. Yes.

90 Q. Among those transcriptions were there any telephone conversations in which Frank Costello was a participant? A. There was.

Q. Incidentally, Mr. Hogan, do you see Frank Costello, the person you interrogated, in this courtroom? A. I do.

Q. Would you identify him, please? A. Seated at the table two to the right of Mr. Williams.

Mr. Robson: May the record indicate that the witness has identified the defendant?

The Court: Yes.

Q. Do you recall the substance of the contents of these wiretaps? A. I do.

Q. Generally, what did they relate to? A. They were conversations between Mr. Costello and various political leaders with reference to the prospective nomination for the Supreme Court in the First Department and they had to do with other activities of Frank Costello.

Q. Did these wiretaps in any way relate to any of
91 Frank Costello's activities during the period of 1920 to 1930? A. Not to my recollection.

Q. To your recollection was there any information at all derived from those wiretaps relating to those activities prior to 1930? A. I can recall nothing pertaining to that period.

Q. Do you recall when these wiretaps were made the dates on which the conversations took place? A. Yes, the interception commenced in May of 1943 and was concluded in November.

Q. Were these the only wiretaps which were in your possession at the time of this interrogation? A. That is my best recollection.

Q. Now, during the course of your interrogation did you have occasion to question Mr. Costello about his activities in prior years, specifically the years 1920 to 1930? A. I did.

Q. Did you have any particular purpose in questioning him about those activities? A. Yes, I wanted to present to the grand jury as much as I could with reference to his background, his activities from the time he came to 92 New York until the date of the interrogation.

Q. Were these activities which you were questioning him about in any way directly involved with the investigation which you were conducting? A. Yes, I thought so.

Q. In what way would you say they were involved? A. I thought the grand jury was entitled to know as much as I could present to it about the witness in order to make a judgment with respect to his testimony.

Q. The facts that you questioned him about were not concerned or involved with the facts that you were investigating? A. Only as I have indicated.

Q. Now, at the time you interrogated him what information, if any, did you have in your possession concerning his prior activities upon which you based your questions? A. Well, I had a record of the telephone conversations between May and November, I had his police record, I had numerous newspaper files, office records, and a variety of other material obtained for me by detectives and investigators assigned to my office.

Q. I am afraid I didn't make myself clear. I was 93 interested in the interrogation concerning his activities between 1920 and 1930. With regard to that interrogation what information were you basing your ques-

tions on? A. Office records, surveillance reports, newspaper files and like material.

Q. For example, I believe you questioned Mr. Costello, did you not, about his activities in connection with bootlegging? A. Yes, I did.

Q. What information did you have leading you to believe that he had been engaged in bootlegging activities? A. To the best of my recollection, newspaper reports, court records, and records of the New York City Police Department.

Q. Did you at any time during the course of your interrogation either state directly to Mr. Costello or indicate indirectly that you were in possession of wiretaps or information derived from wiretaps relating to those earlier activities? A. Not to my recollection.

Q. Mr. Hogan, the questions which I asked you concerning the interrogation before the grand jury—if I were to ask you the same questions with regard to your in-
94 terrogation before the Appellate Division in the Matter of Aurielo, would your answers be substantially the same? A. They would be the same.

The Court: The questions asked before the Appellate Division? You mean questions asked before Commissioner or Master appointed by the Appellate Division?

Mr. Robson: That is correct.

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Mr. Robson: May I ask Mr. Williams whether he will concede the authenticity of these transcripts at this time? Else I will ask Mr. Hogan.

Mr. Williams: I will concede them if they are the ones I have seen.

Mr. Robson: These are the ones you have seen.

May we just mark these for identification at this point, and I have no further questions.

(Marked Government's Exhibits 2 and 3 for identification.)

95 Cross-Examination by Mr. Williams:

Q. Mr. Hogan, do you recall that taps were put on the resident telephone of Mr. Costello on May 7, 1943 pursuant to an order of a New York State court? A. I have no doubt that is the date, Mr. Williams.

Q. And that was at the request of one of your assistants? A. That's correct.

Q. During the time that that tap was on Mr. Costello's phone there was a conversation between him and a Judge Aurelio, is that not the fact? A. That's right.

Q. And it was that telephone conversation which prompted you to present the matter to the grand jury about which Mr. Robson has just interrogated you? A. That is true.

Q. At the time that you presented this matter to the grand jury, which I believe was on October 13, 1943, Mr. Costello was called as a witness by you? A. Yes.

Q. During the course of the interrogation of Mr. Costello you confronted him with numerous wiretap records, did you not? A. I did.

96 Q. Do you recall, Mr. Hogan, that you told Mr. Costello during the course of your interrogation of him that you have had in your possession records of dozens of conversations between him and one Frank Ericson? A. I would have to look at the record, but it is possible.

Q. I am going to hand you this, Mr. Hogan. It has been marked as Government's Exhibit No. 3 for identification, and I direct your attention to page 573. A. Yes. I see that question and answer and I have no doubt that the record is correct.

Q. Do you recall that you told Mr. Costello during the course of your interrogation of him that you were in possession of some 130 calls between him and a man named Moretti, and I direct your attention to page 602, Mr. Hogan, to refresh you on that. A. I see a reference such as you have described, and the record is accurate.

Q. Yes, sir. Now, Mr. Hogan, those taps to which you made reference in your interrogation of Mr. Costello, were

taps that antedated 1943, were they not? A. I beg your pardon?

97 Q. You made reference to taps of conversations between the defendant and one Erierson and then you made reference to some 130 calls between the defendant and one Moretti. A. Yes.

Q. Those were taps that antedated the May 7, 1943 period? A. No, they were not.

Q. Were those taps all within the period from May 7th until November of 1943? A. Yes, except the reference to Moretti, as you will note here on page 602, is to the five months preceding February 1943.

Now all that means is that there was a record of the Telephone Company showing conversations between Costello in New York and Moretti in New Jersey. They were not intercepted. That was simply a telephone record.

Q. Those were not interceptions? A. That's right.

Q. Now, Mr. Hogan, throughout the whole interrogation—and I do not mean to characterize your interrogation of the witness—but I want to ask you if it is not fair to say

that throughout the whole of the interrogation of the witness you brought to his attention telephone calls to which he had been a party and which had been intercepted over his line. A. I did that whenever his memory seemed to fail, to refresh it.

Q. As a matter of fact, is it not the fact that you confronted him with about 75 to 100 calls in that examination? A. That may be. If you have made a count I would accept it.

Q. Do you recall, Mr. Hogan, how long he was under oath and under examination by you in front of that grand jury? A. I don't recall.

99 Q. It was a matter of a couple of hours? A. Oh, at least.

Q. Two hours? A. Yes.

101 Q. All of the questions that were propounded to Mr. Costello in the 1943 grand jury were questions

that were relevant and germane in your opinion to the so-called Aurelio matter, is that not so? A. I thought they were relevant and germane or I wouldn't have asked them, but I thought the background of the witness was important and that the grand jury was entitled to know everything about the man.

Q. As a matter of fact, one of the positions that you were taking as New York County District Attorney was that Mr. Aurelio should be disqualified from sitting by virtue of his relationship with this defendant, isn't that so?

A. And the notoriety this defendant's reputation had earned.

Q. And so that you, in the development of your case, conceived it to be relevant to trace the background of this defendant insofar as you could and from as far back as you could? A. I did.

102 Q. And all of that came about as a result of the conversation intercepted in May of 1943 between this defendant and Judge Aurelio?

Mr. Robson: I object to "all of that" unless Mr. Williams states what "all of that" means.

Mr. Williams: Yes, I will state what "all of that" means.

Q. By "all of that" I mean, Mr. Hogan, all of the interrogation of Mr. Costello before this particular grand jury in October 1943. A. The grand jury interrogation was precipitated by a conversation between this defendant and Judge Aurelio, not in May of 1943 but sometime very close to the grand jury interrogation, possibly September or October of 1943.

Q. And you say precipitated. The interrogation of this witness was directly related to the Aurelio matter which ultimately was heard before Judge Sears? A. I used the word "precipitated" because the interception had nothing to do with an investigation of Judge Aurelio. The order permitting us to intercept the telephone conversations was in connection with another investigation and these conversations were by-products of that investigation.

Q. I understand. My question perhaps was not
103 clear. I say the actual grand jury investigation was brought about by the intercepted telephone conversations between Mr. Costello and Judge Aurelio, notwithstanding the fact that the order permitting the wire-taps may have had nothing to do with that; is that correct?

A. I think that that is fair, and I use the word "precipitate" again because there would have been a grand jury interrogation in any event, but the conversation between the defendant and Judge Aurelio made necessary questioning at the time it took place.

Q. I take it just as Mr. Robson asked you concerning the hearing before, I believe it was Commissioner Sears at the time— A. Judge Sears.

Q. —Judge Sears at the time, was in much the same vein as the interrogation before the grand jury. A. That is true.

Q. And at that time there was mention of these wire-tapped conversations and the witness was confronted with them; is that not so? A. That is true.

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106

Joseph Conway

a witness called in behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson:

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Q. Were you employed by the United States Post Office in 1925? A. 1919-1954.

Q. 1919 to 1954? A. Yes.

Q. In what capacity were you employed by the Post Office in 1925? A. I was a letter carrier.

Q. A letter carrier? A. Yes.

107 Q. You delivered mail on foot to various addresses? A. That's right.

Q. Do you recall at any time having on your route a building known as 405 Lexington Avenue? A. Yes, sir.

Q. Approximately when was that? A. From 1924 to 1926.

108 Q. Do you recall an office in the building at 405 Lexington Avenue, Room No. 516? A. Yes, 516.

Q. Do you recall delivering mail to that office? A. Yes, sir.

Q. Was there one person to whom you delivered mail in that office or was there more than one? A. There was more than one.

Q. Do you recall the names of any of the persons? A. Oh, yes.

Q. Would you tell us some of the names that you can recall. A. Frank and Edward Costello, Loretta Costello, Frank Goss, Harry Sausser or Harry Saucier, and there was a Mr. Ellis, Mr. Merman or Mr. Mehrman, Jack Aloise, and then there was a Mr. Hunt, Mr. Reeves, and that is to my recollection, I don't remember any more.

Q. Did you ever deliver mail personally to any of these people? A. Oh, yes.

Q. Did you know which one was Frank Costello? A. Very well.

109 Q. Do you see the person that you then knew as Frank Costello in the courtroom? A. I think I could remember, although I have not seen him in 31 years. Yes, that man down here with his elbows this way (demonstrating).

The Court: The witness has identified the defendant Costello.

Q. Did you ever have occasion to deliver any registered mail to Mr. Costello? A. Yes, I did.

Q. And did he sign for this mail when you delivered it? A. He signed it. That is how I remember any of them, from signing for mail. That is how I remembered their names.

Q. I show you Government's Exhibit 4 for identification and I ask you if you can identify any of the persons on that exhibit.

Mr. Williams: May we see it, please?

A. Yes, I can remember.

Q. Don't tell us who they are. Can you identify some of them? A. Yes, I can remember.

Q. Would you tell us now one at a time whom you can identify and tell us who they are. A. Well, this is Frank Costello; and this is Harry—

Mr. Robson: Shall we mark it with the letter "A"?

Mr. Williams: Why don't you mark it with "FC"?

Mr. Robson: All right, "FC", the person identified as Frank Costello. A. This is Mr. Ellis; this is—

Q. One moment, please.

Mr. Williams: Mark Mr. Ellis "EE". I think it is Edward Ellis, isn't it?

Mr. Robson: Yes, that's right.

Q. All right. A. This is Harry Sausser. I don't know whether it is S a u s s e r or S a u c e r. I don't know.

Mr. Williams: "HS".

Mr. Robson: "HS".

Q. Is there anybody else that you recognize on that picture? A. No, there is nobody else.

Mr. Robson: I will offer Government's Exhibit 4 for identification in evidence.

The Court: Any objection?

Mr. Williams: I have no objection, your Honor.

The Court: All right, received in evidence.

(Government's Exhibit 4 for identification received in evidence.)

Q. I show you Government's Exhibit 5 for identification and I ask you if you recognize that individual. A. That is Harry Sausser.

Q. That is Harry Sausser? A. Yes.

Q. The same one you identified on the other photograph.

A. Yes.

Mr. Robson: I offer that in evidence.

Mr. Williams: No objection.

(Government's Exhibit A for identification received in evidence.)

The Court: Go ahead.

Q. Do you recall whether Frank Costello ever received any envelopes from a bank? A. Yes, I do remember pretty well.

112 Q. What kind of an envelope was this? A. From the bank. It was canceled checks, well, I understand that it was canceled checks because that is what the government men were looking for, his canceled checks.

Mr. Robson: I will consent to strike that which he says he understands.

Q. This was an envelope that came from a bank with a little glass window in it? A. Yes, a brown envelope. That is what the government inspectors were looking for; that is just the letter they got before.

The Court: All right, that is enough.

The Witness: I call a spade a spade.

Q. Mr. Conway, on how many occasions would you say per week did you see Mr. Costello in this office at 405 Lexington Avenue? A. Well, I figure about, well, at least three or four times a week.

Q. What about this individual whom you identified as Harry Sausser? How often do you recall seeing him?

A. About the same amount, I would judge.

Q. Also about three or four times a week? A. Yes.

Q. How often did you deliver mail to this office, incidentally? How many times a day? A. Delivery at that time was about five a day. I suppose I delivered about four of them.

Q. There has been a big change since then, hasn't there?

A. Yes, that's right.

Q. When you delivered you actually went into the
113a office? A. No, there was a railing inside the door
and you couldn't go any farther.

Q. But you went inside from the corridor? A. Yes,
from the corridor, yes.

Q. Did you ever see a typewriter in that office? A.
Never.

Q. Did you ever see a secretary in that office? A. Never.

114 Q. Do you recall a conversation with somebody
about a bank statement or an envelope coming from
a bank addressed to Mr. Costello? A. Yes, I do.

Q. Did you have a conversation with somebody about an
envelope coming from a bank? A. Yes, they told me to
watch—

The Court: You answered the question. You did have
a conversation?

The Witness: Yes.

Q. This conversation was held with whom? A. Oh, yes.

Q. Whom did you have that conversation with? A. Oh,
with a man, an Immigration inspector.

The Court: Immigration inspector?

The Witness: Yes. Another letter you are speaking of?

Q. I am talking about back in 1925. A. Yes.

115 Q. Did you have a conversation with anybody
back in 1925 about an envelope from a bank? A.
You better give me a better lead than that.

The Court: I think that is a justifiable comment by the
witness.

Q. Do you recall the arrest of Mr. Costello in 1925?
A. Oh, yes.

Q. When did that take place? A. That was either the
first week of November or the first week of December,
1925; I couldn't say whether it was November or December.
It was after he got the bank letter.

Q. What bank letter? A. The bank letter from his
cancelled checks.

Q. Did you do anything with this bank letter that you refer to? A. No, I just passed it over to the inspector. He looked at it and he handed it back to me.

Q. Which inspector was this? A. The senior inspector, postal inspector.

Q. Do you remember his name? A. Frank Shea. He was well known at that time.

Q. Had you been watching for this particular envelope? A. Oh, yes. They were watching for it.

The Court: And they told you to watch for it?

The Witness: Yes.

129

Mitchell S. Solomon

called as a witness in behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson:

Q. Mr. Solomon, by whom are you employed? A. By the United States Immigration Service, Department of Justice.

Q. I show you Government's Exhibit 8 for identification and ask you to tell us what that is. A. This is the admitted or docket slip. This also bears the number 61756 and the court, is listed as 2270. This is filled out by the Preliminary Examiner in his examination of the applicant and his two witnesses.

152

New York, December 12, 1958,

10:30 o'clock a.m.

161

Cross-Examination by Mr. Williams:

166

Where Government's Exhibit 8 says: "US and NYS since April 2, 1895" that means that the

applicant in this case had been in the United States and had lived in New York State since April 2, 1895; right?

A. Yes.

Q. And "PA6 mos." means what, Mr. Solomon? A. I believe it means present address, six months.

Q. And then "MNY Sept. 23, 1914" means married in New York September 23, 1914, is that right? A. I believe so.

Q. And "R/W" means resides with wife? A. I think so.

Q. And "n" means no children, I take it. A. I don't know whether that is a typographical slip.

Q. And then "SERF" means speaks English and 167 reads English, is that right? A. That's right.

Q. "SNYSP8G" means what? A. I think it is school New York.

Q. "8G" would be eighth grade, is that right? A. I don't know whether that is an 8 or not. It might be.

Q. And "G/F" means what? A. Government fair.
The Court: Government fair?

The Witness: I think so.

The Court: What does that mean?

The Witness: I think the examiner asked him some questions about the nature of the Government of the United States.

181 Mr. Williams: Your Honor, I will concede that each of these directories, which apparently are the Manhattan and Bronx directories for 1923, 1924, 1925 have a listing Edward Costello, 405 Lexington Avenue, Vanderbilt 8745.

I have grave questions in my mind with respect to the materiality of this evidence but I do not think that it is properly the time to argue that point.

Mr. Robson: May we also have a concession, Mr. Williams, that there is no listing for Frank Costello at that address?

Mr. Williams: There is no listing in these directories for Frank Costello at 405 Lexington Avenue.

called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson: o

Q. Mr. Kessler, have you ever been arrested or convicted of any crime? A. I have.

Q. Will you tell us when and what the crime was. A. Well, I have a few of them.

Q. Tell us to the best of your recollection.

205 A. Violation of the Prohibition Act in 1923 or 1922.

Q. Were you convicted? A. Yes.

Q. Were you sentenced? A. I was sentenced.

Q. And what was your sentence? A. To Atlanta two years.

Q. What else? A. Violation of the Prohibition Act in 1926 or 1928, suspended sentence.

Q. Anything else? A. And income tax violation.

Q. When was that? A. Suspended sentence.

Q. When was that? A. I think 1926 or 1928.

206 Q. How old are you, Mr. Kesler? A. 69; I will be 69 in March.

Q. Now, Mr. Kessler, at one time you were in the wholesale liquor business? Is that correct? A. From 1910 on.

Q. From 1910 on? A. Yes.

Q. Do you recall the passage of the 18th Amendment and the National Prohibition Act? A. Would you repeat that?

Q. Do you recall the adoption of the 18th Amendment and the passage of the National Prohibition Act? A. Yes.

Q. At that time were you in the wholesale liquor business? A. I was.

Q. And under that Act, as I understand it, you were then restricted to selling alcoholic beverages only for medicinal purposes? Is that correct? A. Right.

207 Q. Did you continue in business after prohibition? In the liquor business. A. Well, I went into another

business, but made a failure of it, and went back into the liquor business.

Q. When? A. In 1920.

Q. When did you go back into the liquor business?

A. 1920.

Q. Was that the business of selling liquor for medicinal purposes? A. It was, but we didn't do it.

Q. You didn't sell liquor for medicinal purposes? A. No.

Q. Would you describe your activities at that time? Just what did you do? A. I had a permit from the Government, a \$100,000 permit, and I had a place on 28th Street off Sixth Avenue. I generally carried a few thousand cases of liquor on hand at all times.

Q. This was liquor that you withdrew from Government warehouses? A. From Government warehouses.

Q. And that was to be sold for medicinal purposes?

A. It was to be sold for medicinal purposes.

Q. What did you sell it to? A. I sold it to speak-easies.

208 Q. Did you obtain liquor from any other source besides Government warehouses? A. By boats later on.

Q. How much later on was this? A. About, oh, a year later, 1921.

Q. 1921? A. Yes.

Q. Describe those operations. A. Well, I had a large boat out at sea, a 1500-ton steamer, that I brought liquor from Europe. I had a bottling plant at the time in Hamburg and then I had smaller boats running, fishing boats that carried 500 cases and they brought them in nightly. They brought in 500 a night.

Q. 500 cases a night? A. Yes.

Q. That was from the— A. From the large steamer, yes.

Q. Where was this large steamer located? A. Somewhere off Montauk Point.

Q. How long were you so engaged in the withdrawal of liquor from warehouses and the importation of liquor from Europe? A. Until the end of 1923.

209 Q. Approximately how substantial was your business? How much liquor did you import or sell?

A. On an average of about three, four thousand cases a week.

Q. What would that run dollarwise? What did you pay for this liquor? A. It stood me about \$12 to \$15 a case, and I would—according to the market—if it brought a hundred, I got a hundred; if it brought fifty, I got fifty.

Q. Fifty what? Dollars per case? A. Dollars per case.

Q. Now, do you know the defendant, Frank Costello? A. I do.

Q. Do you see him here in the courtroom? A. I don't see him here.

Q. Stand up, please. A. There is Frank there (pointing).

210 Mr. Robson: May the record indicate that the witness has identified the defendant?

The Court: Yes. I said at the end of the table, because he pointed right at Mr. Costello. That is how I knew he was the man he meant.

Q. When did you first meet Mr. Costello? A. Late 1919 or the early part of 1920.

Q. Was this prior to Prohibition? A. No, Prohibition was in effect.

Q. Prohibition was already in effect when you first met him? A. Yes.

Q. Where did you meet him? Do you recall? A. That I don't recall.

214 Q. Mr. Kessler, did there come a time when you had a conversation with Mr. Costello concerning bootlegging? A. Very often.

Q. Tell us when the first time was that you discussed

bootlegging liquor or anything relating to it with Costello. Approximately. A. We may have discussed it during the whole of 1920 but in the latter part of 1920 he told me that if I bought some trucks for him and his brother they
 215 would haul the merchandise for me from Long Island, from the place that I brought the merchandise in from the big boat.

Q. Do you recall where this conversation took place?
 A. I don't recall.

Q. Could it have been at your office? A. It might have been possibly at my office.

Q. Did you do anything pursuant to that conversation?
 A. I did. I advanced him the money, or I bought the trucks. I think I advanced him the money and they bought the trucks.

Q. Do you recall how much you advanced? A. I have not any idea.

Q. Any approximation? A. A few thousand dollars.

Q. And do you remember how many trucks were bought?
 A. I think two or three.

Q. Two or three trucks? A. Yes.

Q. Thereafter, did Frank Costello commence trucking liquor for you? A. Well, I can say Frank Costello or his brother.

216 Q. Were they both active in this, or just one of them? A. That I would not know.

Q. Now, will you describe the arrangements which were made? How you operated? A. Well, they had a house out in Halsey Street, Long Island City, and in the back of that house—at the side of the house, was a large yard. In the back of the yard was a 50 by 100 garage, jutting out to the other street. I took a mortgage subsequently on that same garage, and every night they would haul—whatever they hauled they took into that garage. I would send small trucks over from New York to bring the stuff to some of my other warehouses for delivery.

217 Q. How did you advise them of where and when to pick up merchandise? A. I would call them up

on the wire at their office over at Lexington Avenue and tell them, or I would send someone over.

Q. Do you remember where that office was on Lexington Avenue? A. Where the Chrysler Building is now. I wouldn't know the number.

Q. Do you remember what the address was? A. I think that is 405, I think, or 404. I don't know.

Q. 405 Lexington Avenue? A. Where the Chrysler Building is now.

Q. Whom would you talk to when you made these arrangements? A. Whoever was in the office.

Q. Do you recall talking to Frank Costello on occasions about these arrangements?

218 A. I would call anybody at the office, whoever was there, whether Frank or Eddie or whoever was there, his bookkeeper—I don't know whether he had a bookkeeper at the time.

Q. Well, do you have any recollection of having spoken to Frank on any occasions? A. Very often.

Q. You did speak to him often in connection with these arrangements? A. Of course.

Mr. Robson: Will you mark this for identification, please.

(Marked Government's Exhibit 12 for identification.)

Q. I show you Government's Exhibit 12 for identification and I ask you if you can tell what those two pictures represent. Do you recognize them? A. That is Costello's house at the left and the garage on the next street.

Q. Is that the house that you were referring to in Long Island? A. Yes.

Q. And is that the garage that you referred to as 219 being behind it? A. Yes.

The Court: You say, Mr. Kessler, that was Costello's house. Did he live there?

The Witness: No, not Frank Costello. His brother Eddie lived there and his mother.

The Court: And that is the house adjoining this lot where the garage was?

The Witness: Right.

(Government's Exhibit 12 for identification received in evidence.)

Q. Incidentally, how long did the Costello brothers continue to work for you at trucking liquor? A. Until the very end, when I went away, until about December of 1923.

Q. Was the liquor stored in any other place besides the garage which you just described? A. That the Costellos had?

220 Q. Yes. A. Yes, they had a large mansion, the Blackwell Mansion in Long Island. It originally belonged to Blackwell that the island was named after, and I had about 2500 or 3000 cases there that I had taken from a warehouse in New York City. Also about 2500 gallons of alcohol and about 1000 cases of whisky that I had brought from the boat. That is the place that was raided.

Q. Had you made any arrangements with anybody to use this house? A. I never saw the house. They took it in their name.

The Court: Who?

The Witness: The Costellos.

Q. The Costello brothers made the arrangements to get this house? A. Yes.

Q. Had you discussed it with Frank Costello at any time? A. I had to discuss it with both of them.

The Court: What did you do? Pay a certain amount of money to them for storing the liquor?

The Witness: I paid a dollar for haulage and a
221 dollar for storage.

The Court: Whom did you make those arrangements with?

The Witness: With either Frank or Eddie, I don't remember who. I can't pinpoint who it was.

Q. Were there occasions when you made the arrangements with both of them? A. With either one or both of them.

Q. But you recall making arrangements at one time or another with both Frank and Eddie? A. Very often.

Q. Incidentally, about how many cases did they truck for you a week? A. Well, my boat came in every night; I guess about 3000 a week.

Q. In other words, you would have paid them about \$3000 a week— A. Plus a dollar for storage. That is \$6000.

Q. That is \$6000 a week? A. Yes.

The Court: Did you pay it to them in cash?

The Witness: Either cash or check, or in merchandise once in awhile.

Q. Do you have any recollection of having
222 arranged for any construction work of any sort out in Halsey Street? A. I built a vault in the garage.

Q. Was that a vault in the ground? A. Underneath the garage.

Q. Underneath the garage? A. Yes.

Q. What was this for? A. For storage of merchandise to hide it.

Q. You used to hide it in the vault? A. Yes.

Q. Was this vault concealed in any manner? A. All you had to do was take off one of the larger slabs and a stairway would lead down into the vault.

Q. And did you ever discuss the arrangements for this job with Frank Costello? A. I may not have discussed it with him at all; I may have discussed it with his brother.

Q. You don't have any independent recollection? A. I don't have no recollection at all.

Q. But whisky which was brought in was stored there; is that right? A. Yes.

Q. Did you ever have occasion to visit 405 Lexington Avenue or the offices which you talked about?

A. Oh, I went there, not often, possibly once a week or once every two weeks. My office was only around the corner at Madison Avenue.

Q. Did you have occasion to see Frank Costello there?

A. Yes, often. That is when I came there.

Q. You said on occasions you used to pay Frank Costello with merchandise. What do you mean by pay him with merchandise? Did you pay him in liquor? A. I wouldn't pay him in full with merchandise. They might take 50 or 100 cases.

Q. Did you ever have any conversation with them as to why they took these cases, as to why they wanted them?

A. No, no conversation with them.

Q. Do you know what they did with the cases? A. I have no idea.

Q. Do you recall a conversation you had with Frank Costello regarding some whisky that was missing? A. You see, the Government was after—I had 3000—

Q. First, do you recall that conversation? A. I do.

224 Q. Would you tell us what that conversation was and the events which led up to the conversation.

A. Well, I missed—

Mr. Williams: Can you fix that in point of time?

Mr. Robson: I am sorry.

Q. Can you tell us when that conversation took place?

A. Around the beginning of 1923—the end of 1922 or the beginning of 1923, I can't pinpoint the date.

Q. Well, the best of your recollection. A. That is the best of my recollection.

Q. Would you tell us now what that conversation was. A. There were 500 cases of Scotch missing that were easily marketable at \$110 a case, it is quite a little money, and I found out that it was on the market where I had taken it off due to the fact that the Government was looking for it; and I found that it was being sold in New York.

I knew it only came from one source, and I accused Costello of it.

Q. And what happened? A. Well, there was a little argument over it and we made up again. We had to make up.

225 Q. I beg your pardon? A. I say we had to make up.

Q. Why did you have to make up? A. Well, he knew all my warehouses. I had merchandise with him. It was compulsory.

Q. Incidentally, where had those 500 cases been that you didn't think were on the market and which turned up on the market? A. Where did they disappear?

Q. No. Where had they been? A. In the Blackwell Mansion.

Q. Had Frank Costello stored them there for you? A. I don't know whether it was Frank, call it Frank and Eddie, call it Eddie.

Q. Do you recall anything that Frank Costello said to you during the course of this argument or anything he did during the course of this argument? A. Well, we had an argument at the hotel where I lived, at the Ansonia at the time. I don't recall any—what we said or what we did.

Q. Is that the Ansonia Hotel here in New York? A. Yes.

Q. Where is that located? A. 73rd and Broadway.

226 Q. After this argument you made up and continued working again together; is that correct?

A. Yes.

Q. You stated earlier that you were convicted in 1923 and sentenced to two years? A. Yes.

Q. Did you have a conversation with Frank Costello before you went to jail? A. I must have had a number of conversations with him.

Q. Do you recall any conversation with Frank Costello which related to the fact that you were going to jail or what was to be done in the future or what was to happen in the future? A. You see, I had lost all my merchandise

in the Blackwell Mansion, about a quarter of a million dollars' worth. The place had been raided. But they kept on trucking for me. I didn't know until later on that in May 1923 this merchandise—through the Court of Appeals—that the Costellos had gotten all that merchandise back, but I was never told about it.

That was quite a good start for them to get monetarily, and when I left for Atlanta, Frank Costello personally asked me—I didn't know about this, him having
227 gotten this merchandise back—asked me for some money so he could continue on.

I think I left him either 100 or 200 cases.

That is the last I saw of him until I came out and I asked him for it and he laughed it off and I forgot about it.

Q. You asked him for what? A. For the money for this merchandise.

Q. He never paid you for it, you say? A. Never paid me. Everybody else I left money with—and it amounted to a lot of money—I gave one man \$50,000; another man \$40,000, everybody paid back.

Q. When did you go to speak to Mr. Costello about this payment for the merchandise? A. About 1926 or the latter part of 1925. I came out in 1925.

Q. Mr. Kessler, when was the first time you spoke to anybody in the Government about your connection with Frank Costello? A. I think I was called down to the FBI about ten years ago and they mentioned over the wire why they wanted to see me, and I called Costello's lawyer at the time, George Wolf, and I told him I have no idea what it was all about, but they seemed to ignore me, and
228 I went by myself.

Q. Is this the FBI you are talking about or the Immigration Service? A. I am talking about the FBI, in the same building, I think on the fifteenth floor. George Wolf seemed to ignore me. I called Costello a number of times at the hotel uptown but they didn't want to—so I dropped it.

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229 Cross-Examination by Mr. Williams:

230 Q. You testified this morning under examination by Mr. Robson that there came a time when you had a conversation concerning some trucks in which you were going to haul your whisky. A. That's right.

Q. And you advanced some money, I believe you said, to the Costellos to buy trucks. A. Right.

Q. Is that correct? A. Correct.

Q. And you fixed that conversation in point of time in what year? A. I guess about 1920, the beginning of 1921, I can't pinpoint any date because that is 40 years ago we are discussing.

Q. As a matter of fact, these dates are very hazy in your mind, is that not correct? A. The dates are, correct.

Q. The dates of the activities which you described? A. Not the dates of the activities, I described; just the dates.

Q. The dates of the activities are hazy in your mind?

240 A. There is a difference between activities and the advancement of money. In other words, I don't remember the day I advanced the money or the day I may have had a talk with someone, but I know it happened between the end of 1920 to 1923, let us say, that period of time.

Q. Did you advance money for the purchase of trucks? A. Right.

Q. And that money was advanced to Eddie Costello; is that right? A. I didn't know Eddie Costello.

Q. When did you get to know Eddie Costello? A. After Frank introduced him to me.

Q. When did he introduce you to him in relation to the conversation that you had with him? A. Possibly the end of 1920 or the beginning of 1921.

Q. How much money did you advance for the purchase of these trucks? A. I haven't the least idea.

Q. You have no recollection? A. None at all. I know I paid for them.

Q. This morning you said it was two or three
241 thousand dollars. A. It might have been more.

Q. Do you know how many trucks were actually
bought? A. Two trucks, I think.

Q. Two trucks were bought? A. I don't remember
exactly.

Q. Was that a trucking business that Eddie Costello
ran from Halsey Street? A. He never had a trucking
business until I gave him the trucks.

Q. I understand that. But that trucking business or
those trucks that you gave him were run from Halsey
Street? A. That's right.

Q. And that is where Eddie Costello lived, isn't
242 that so? A. Yes.

Q. 114 Halsey Street. A. I don't know the
number.

Q. Eddie Costello was older than Frank Costello, is
that not right? A. Yes.

Q. About ten years older? A. I don't know the exact
number of years.

Q. But you did know that he was older than his brother?
A. He was, yes.

Q. These trucks which you bought were stored or housed
at Halsey Street at Eddie Costello's home, is that right?

A. That's right.

Q. Eddie Costello is the Costello who ran that hauling
business or trucking business, is that not so? A. Yes.

Q. There came a time, you said, when you went to 405
Lexington Avenue and you went there so frequently as
maybe once a week, is that right? A. Possibly more.

Q. In what years did that take place? A. I guess 1922
and 1923.

243 Q. Did you have conversations at 405 Lexington
Avenue concerning the trucking business? A. I
guess that is the only thing I could discuss.

Q. And it was Eddie Costello with whom you discussed this? A. It might have been either Eddie or Frank, whoever was there.

Q. Isn't it a fact that Frank made the arrangements for Eddie to get these trucks so that he could go into business when he had the conversation with you in 1920?

A. He may have.

Q. Isn't that the fact, Mr. Kessler? A. I can't state it as a fact because I wouldn't take a stranger off the street, whether it was Frank's brother or anybody else's brother and advance him money. I didn't know the man. I advanced on the strength of Frank Costello.

Q. Isn't it a fact that the money was advanced for a business which Eddie was to operate, namely, the trucking business? A. That is between themselves, I don't know.

Q. You don't know on that subject? A. I don't know.

244 Q. Isn't it a fact that Eddie Costello actually ran the trucking business during those years? A. He may have. I can't state it as a fact because I don't know. I don't know what interest Frank had with him or Eddie had with Frank. Frank may have had nothing or Eddie may have had no interest.

Q. You have no information on that subject? A. I have none at all. I can't give you concrete information, I would only be guessing if I told you.

Q. During the period when you knew Frank Costello between 1920 and 1923, did you know that he had engaged in a number of real estate transactions? A. I didn't know.

Q. You did not know? A. No.

246 Q. I will ask you, Mr. Kessler, weren't you aware that Mr. Frank Costello was conducting a real estate business? A. I was not.

Q. At 405 Lexington Avenue? A. I was not aware. He may have. I don't know.

Q. You had no personal knowledge of real estate transactions in which he was engaged? A. I was not that close. I don't know.

247 Q. Now you testified this morning concerning some whisky which was stored in a building and that you called Blackwell's Mansion. Where is that, Mr. Kessler? A. In Long Island City.

Q. That was a private house which was being used as a storage plant? Is that what it was? A. It was a large mansion, a pretty large mansion. I was never inside of it.

Q. You were never inside of it? A. No.

Q. You had had whisky stored there during the years 1922 and 1923? A. Yes.

Mr. Williams: Do you have those pictures, Mr. Robson?

Q. Mr. Robson showed you what has been marked as Government's Exhibit 12 this morning. He showed 248 you a picture of a garage and a picture of a house. A. That's right.

Q. Now the house is the house in which Edward Costello lived; is that right? A. And his mother.

Q. And his mother. And the garage is the garage behind that house where your whisky was stored; is that right? A. That's right.

Q. Is that also where the trucks were kept by Eddie Costello? A. They were.

Q. The two trucks? A. The number of trucks I don't know.

Q. Excuse me? A. The number of trucks that he kept there I don't know.

Q. Do you recall what kind of trucks they were, Mr. Kessler? A. I think they were Macks.

Q. Mack trucks? A. Yes.

Q. Were they large trucks or small panel trucks? A. Large trucks.

249 Q. They were large trucks? A. Yes. I would send my small panel trucks to take some of the mer-

chandise to New York from there. I had a half dozen, possibly more, panel trucks.

Q. There were other Costellos who lived in that Halsey Street area who worked for Eddie or for you, were there not? A. They never worked for me.

Q. Some nephews. A. The only one that ever worked for me was Costello's brother. Otherwise nobody worked for me. The nephews may have worked for Eddie, but I don't know which ones. I may have met them.

Q. The only one who ever worked for you was Eddie Costello? A. Eddie Costello's brother worked for me—I mean Frank Costello's brother-in-law worked for me.

Q. What was his name? A. I don't remember.

Q. You don't recall? A. His wife's brother.

Q. Now during 1923 you had conversations with Eddie Costello concerning the whisky at Blackwell's
250 Mansion, did you not? A. I did.

Q. It was Eddie Costello who was in charge of the storage of this whisky for you at Blackwell's Mansion? A. Well, you can't pinpoint and pick an individual. My main trust was not Eddie Costello. My main trust was Frank Costello. Eddie Costello could not hold a conversation with anybody for ten minutes.

Q. You relied on Eddie because you knew his brother had confidence in him; is that right? A. I don't get your question.

Q. I said you did business with Eddie because you relied on his brother Frank and had known him, is that correct, previously? A. Yes, I can say that, yes.

Q. At no time did you ever buy or sell whisky to the defendant in this case? A. Buy or sell?

Q. Yes. A. The only one that I remember very pointedly is the last 100 cases that I gave to him personally before I left.

Q. But you never— A. I never had any to sell.

251 Q. You never had any transaction involving the sale of whisky with Frank Costello? A. The sale of whisky, no.

Q. And the transaction involving the trucks which hauled your whisky was a transaction which was handled by Eddie Costello? A. It was handled by Frank. I didn't know Eddie.

Q. The first transaction you had concerning the purchase of the trucks was with Frank. That was in 1920? A. Right, whatever the date was.

Q. But thereafter it was Eddie that ran the trucking business, wasn't it? A. That's true.

The Court: Any further questions?

255 Q. Did the record of your case in the federal court show that you knew Frank Costello? A. Sure.

Q. It did? A. It did.

256 Q. Was there a reference to Mr. Frank Costello in your 1923 case? A. I don't know whether it was Frank or Eddie, I don't know.

Q. Did Eddie Costello testify in that case? A. He did not.

Q. Did Frank Costello testify in that case? A. He did not, no.

Q. Were they defendants in that case? A. They were not.

Q. Did anybody mention their names in that case? A. They did not.

Q. Then how did the records of that 1923 case show that you knew Mr. Frank Costello? A. The prohibition agents that had been working on the case, they had to come in contact with the Costellos because I was connected on the Blackwell's Mansion raid. That was part of the conviction, part of the testimony.

Of course, when that raid was made there were about 20 Costellos arrested at the time and held on bail. I had to bail the whole family out.

257 Q. There were about 20 Costellos arrested at that time? A. Different cousins and so on.

Q. Among the 20 Costellos who were arrested at that time— A. Frank wasn't among them.

Q. Frank wasn't among them? A. No.

Q. Was Eddie among them? A. Eddie was not.

Q. Who were the ones who were among them if you recall? A. I don't know.

Q. Were they brothers or cousins or nephews? A. Cousins.

Q. They were cousins? A. Yes.

Q. And they lived where? A. Around the same neighborhood, Halsey Street.

Q. Frank Costello didn't live near Halsey Street, did he? A. No, he lived in New York.

Q. In New York City. All the rest of them lived around Halsey Street? A. That's right.

Q. And those were the ones who were engaged in this trucking business that you have described for us here? A. I guess so, yes. They must have been. You see, I didn't know them individually.

Q. The Blackwell's Mansion raid took place when? A. At the end of 1922, I think. Even though it was a big thing, I can't pinpoint it as to the date. You have those. That you can get without any trouble.

267 Redirect Examination by Mr. Robson:

Q. Just to clear the record a bit, you were using the Costello trucks to bring your liquor in from Long Island somewhere in the early part of 1921 until you went to prison in— A. Not '21, but 1922 and 1923.

Q. 1921, 1922 and 1923? A. No, just 1922 and 1923.

Q. Those were the years you were using Costello's trucks? A. Yes.

Q. And these trucks were bringing in liquor about once a night, is that correct? A. Almost every night.

Q. And business necessitated, did it not, your communicating with somebody to make arrangements approximately once a day?

Mr. Williams: I don't think counsel should testify in the case.

The Court: It may be leading. Change the form of your question.

268 Q. How frequently did you communicate? A. I may not have communicated, my bookkeeper or the girl in the office may have communicated.

Q. How frequently would you have made arrangements? A. I may have spoken to him once or twice a week.

Q. Once or twice a week over a period of two years? A. Yes.

Q. And you visited their office about once a week, is that correct? A. I guess so, once or twice a month possibly.

Q. Did they ever visit your office? A. Yes, sure.

Q. Both Frank and Eddie? A. No, I would say most of the time Eddie.

Q. Did Frank ever visit your office? A. Yes, he was there a number of times.

Q. How frequently did he visit your office? A. He may have been there in two years a dozen times.

269 Q. With whom were these arrangements made?

A. These arrangements were made with the office. I cannot at this time point at Frank or point at Eddie. They were made with the office, with their office. If Frank was on the wire he got the order. If Eddie was on the wire he got the order.

Q. Were there occasions when Frank Costello was on the wire? A. I can't say yes or no. This is 40 years ago we are talking about. I guess he was.

Q. Can you recall whether you ever spoke to him without recalling a specific occasion? A. I spoke to him many times.

Q. With regard to arrangements? A. Yes.

Q. Can you recall whether you ever made payments to him without regard to any specific occasions? A. That

I wouldn't know, we would send the checks
270 or cash over and whoever was there took it.

Q. That was 405 Lexington Avenue? A. Yes.

307

Louis M. Dillon

called as a witness in behalf of the Government, being first
duly sworn, testified as follows:

Direct Examination by Mr. Robson:

Q. Prior to retirement, by whom were you employed—
the U. S. Government? A. Yes.

Q. In what capacity? A. United States Naturalization
Examiner.

308 Q. From April 1, 1925, to December 1, 1925, to
which office of the Naturalization Service were you
assigned? A. I was assigned to the New York office. Their
headquarters were over here at 154 Nassau Street.

Q. Are you acquainted or familiar with the procedure
which was followed by the New York office during that
period in connection with the processing of applications
for naturalization? A. Yes, sir.

309 Q. What is the first step in the process of an
alien becoming a citizen? A. Well, the initial step
would be the submission of a preliminary application
by the alien prepared by him or by someone in his behalf.

Q. Is that form called the Declaration of Intention?
A. No, Declaration of Intention is a document independent
of the preliminary application for naturalization.

Q. What is the Declaration of Intention? A. That is
commonly called a first paper. That can be taken out at
any time after the alien enters the country.

Q. And isn't that really the first step, the Declaration of
Intention? A. Yes. You must have a declaration that is
at least two years old and not older than seven before you
can proceed with a petition for naturalization at that time.

Q. The next step is to submit a preliminary form; is that correct? A. That is accompanied by the declaration of intention, yes.

Q. And this form is submitted by the alien, did 310 you say? A. Well, the blank form is given to the alien and the information is filled in by him or by someone in his behalf.

Q. I show you Government's Exhibit 7 in evidence and ask you is this the preliminary form to which you refer. Is this an example of one? A. Yes, that is the form that was used at that time.

Q. After this preliminary form was filed by the alien, what was the next step? A. The next step after the preliminary form was received with the declaration, that file was then sent to the port of entry, depending on where he alleged he arrived. If he arrived at Ellis Island, that file would be sent to the port of entry in New York and a certificate of arrival or verification of his legal entry was made and a certificate issued there and then that was attached to the file and sent back to the Naturalization office.

Q. Was that the invariable practice? A. That's right, provided the man arrived after 1906.

Q. Providing he arrived after 1906? A. It was— 311 if he arrived before 1906 he didn't need a certificate of arrival.

Q. If a man arrived prior to 1906 what was the procedure? A. If no verification was required at the legal port of entry, then a notice for examination would be mailed to the alien to appear at the Naturalization office at some particular time, accompanied by two witnesses.

Q. On occasion would the preliminary examination be held simultaneously with the filing of the preliminary form without the intervening period during which a notice was mailed to him? A. No. The alien must appear personally with two witnesses upon appointment and then he is assigned to a preliminary examiner and the official examination takes place then.

Q. Was the procedure ever followed whereby an alien would appear with his two witnesses and with his preliminary form and go through his preliminary examination on the same day? A. That would be very unusual. I don't think so. His file must be assigned a file number before it can go ahead. There must be a file number assigned to the application.

312 Q. You say that would be an unusual practice?

A. Very unusual.

Q. At this preliminary examination what would be done by the examiner? Incidentally, is this the preliminary examination which you say you used to handle? A. That's right.

Q. What was the practice which was followed by the examiner at this preliminary examination? What questions was he required, if he was required, to answer? A. The file would be assigned to the preliminary examiner with the alien and his two witnesses. The examiner would take the file into his room and he would probably review it and then he would call for the petitioner to come in first to be examined.

Q. What would he do when he questioned the petitioner? Was there any set procedure which was followed? A. He would go through the application step by step, based on the information in the application and verify it with the alien, ask him the information in the application, if each allegation was correct. If he says that it is correct as written in the application, a check mark would be made beside each allegation. If any statement was in-

313 correct, then a correction would be made in the preliminary application to conform to the statement of the alien.

Q. I show you again Government's Exhibit 7 in evidence and I ask you whether there is anything on here indicating that that procedure was followed with this particular preliminary form. A. Yes. I noticed that there are red check marks after the allegations in the preliminary form, which indicates to me that the preliminary examiner asked the

alien if that particular information was correct, and if his answer was yes, a check mark was made beside that allegation in the form.

314 Q. In addition to checking the statements on the preliminary form, what if anything else, did the preliminary examiner do or was he required to do? A.

315 In each case there was a—you might term it a history slip, and according to the practice of the Service certain answers made by the alien in connection with his preliminary examination would be recorded by symbols on this history slip, which amounted to a finding.

Q. Do you recall what some of these questions were that were asked of the alien and notations of the answers recorded on this slip? A. Well, the pertinent information in the preliminary form, whether the alien was married and the year of his marriage, whether he had any children, whether he was residing with his wife, whether he had ever been absent from the United States since the date of his original entry, whether he had ever been fined or arrested or convicted of a crime, whether he believed in the form of government which existed in the United States, whether he could read, whether he could write, whether he could speak English well.

364 New York, January 5, 1959,
10:30 o'clock a.m.

381 Frank Kelly

called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson:

Q. Mr. Kelly, during the period when Prohibition was in effect, were you at any time engaged in bootlegging activities in one form or another? A. Yes.

Q. And when did you first become involved in such activities?

382 A. Around 1922.

Q. Prior to your becoming involved in bootlegging activities what business if any were you engaged in? A. I was in the garage business.

Q. Will you speak up. A. The garage business.

Q. Were you engaged in the garage business with anybody else? A. My brother.

Q. What was his name? A. Edward.

Q. Would you describe your activities, your bootlegging activities, when you first became involved in bootlegging. Just what did you do? A. I brought liquor in from boats offshore, sold it on the beach. I sold it from the rail offshore.

Q. Speak up a little. A. I sold it offshore, from the rail, and brought some in.

Q. Was this liquor you were importing? A. Yes.

383 Q. Where did you obtain the liquor? Where did you buy it? A. In Europe or St. Pierre, Cuba.

Q. Did you own any boats or ships of your own at any time? A. No.

Q. Did you ever charter any boats? A. Yes.

Q. What sort of boats did you charter and when? A. Schooners, probably 1924 or 1925.

Q. Do you recall a ship by the name of the Vincent A. White? A. Yes.

Q. When did you charter that? A. Some time around 1924 or 1925.

Q. For what purpose were you using that ship? Also for importing whisky? A. Yes.

Q. Where were you getting whisky from at that time? Also from Europe? A. St. Pierre or Cuba.

Q. Approximately how large were the shipments you brought in on the Vincent A. White or these other

schooners? A. I never brought it in. It was off the coast.

384 Q. How much of a load did they carry? A. 2500, 3000, 4000 cases.

Q. What was their capacity? A. Maybe 5000 or 10,000.

Q. Around the years 1924 and 1925 did you have occasion to meet a man by the name of Harry Sausser?

A. Yes.

Q. Would you recognize a picture of Harry Sausser if you saw it? A. I think so.

Q. I show you Government's Exhibit 5 in evidence and ask you if that is the individual you knew as Harry Sausser.

A. Yes.

Q. Mr. Kelly, I show you a duplicate of Government's Exhibit 4 for identification and ask you if you can point out Harry Sausser if he is in that picture. A. I can.

385 Q. Will you tell us where he is standing? A. He is sitting; not standing.

Q. Speak up. A. He is sitting, not standing.

Q. Where is he? Where is he sitting? Will you describe anything about him that will identify him. He is in the second row, the first man.

Q. On the right or on the left? A. On the right as I look at it.

Q. Is there anything about him that signals him out? A. The bald head.

Q. Anything else that you can see? A. That is all.

Mr. Robson: Mr. Williams, will you concede for the record that the individual just identified by this witness is Harry Sausser, that the individual which has just been identified through the testimony of this witness as Harry Sausser is the same individual on Government's Exhibit 4, having the initials H.S. on his right shoulder?

Mr. Williams: All right, so conceded.

Q. When did you first meet Harry Sausser? A. Some time in '25, 1925.

386 Q. You were arrested in 1925 and charged with bootlegging, is that correct? A. Yes, sir.

Q. Do you recall when you were arrested? A. No, sir.

Q. Was it the early part of 1925, the latter part, or the middle part? A. I think it was the early part, though. That would be to the best of my recollection.

Q. If I told you that the record indicated that it was in December, 1925, would that refresh your recollection?

A. If you would tell me it I would believe it.

Q. With relation to your arrest—strike that—at the time you were arrested, you were also indicted shortly thereafter, is that correct? A. I was indicted before.

Q. You were indicted before the arrest? A. Yes.

Q. Who was indicted along with you, do you remember?

A. There were 30 or 40 names.

Q. Was Frank Costello one of them? A. Yes.

387 Q. Now, with relation to your indictment when did you meet Harry Sausser? A. About a month or two or three before that.

Q. A month or two or three months before that? A. Yes.

Q. And did you have occasion to meet him subsequent to your first meeting? A. You mean before that?

Q. No, afterwards. A. I met him once or twice, maybe three or four times after that.

Q. Who first introduced you to Harry Sausser, do you recall? A. A man by the name of Coffey.

Q. Do you recall Coffey's first name? A. Phil.

Q. Where were you introduced to Harry Sausser? A. I believe to the best of my knowledge it was Montauk Point.

Q. Was anybody with Harry Sausser when you were introduced to him? A. There was Mr. Coffey and Frank Costello.

Q. Well, did you know this Frank Costello or meet
388 him prior to that time? A. No.

Q. You had never met him previously? A. No.

Q. Do you see the man that you met then as Frank Costello in the courtroom? A. No.

Q. Will you stand up and look around, please.

(Witness stands in witness box.)

A. Yes.

Q. Would you point him out. A. Over there.

Q. Would you describe where he is sitting. A. The third man at the table.

Q. At this table (indicating defendant's counsel's table)?

A. Yes.

Mr. Robson: May the record show that the witness has identified the defendant, your Honor?

The Court: Yes.

Q. At the time you first met Harry Sausser did you have a conversation with him? A. With Harry Sausser?

Q. Yes. A. Yes.

389 Q. Was Frank Costello present during this conversation? A. To the best of my knowledge, yes.

Q. Will you tell us what that conversation was. A. Mr. Sausser wanted to put some merchandise on my boat offshore, to store it.

Q. What sort of merchandise? A. Liquor.

Q. Do you know how much? A. Not at the moment I don't, no.

Q. Well, approximately how much? A. A couple of thousand cases.

Q. A couple of thousand cases he wanted to put on? A. Yes.

Q. Will you tell us the conversation. A. That was all.

Q. There was no conversation concerning compensation? A. Well, to put it on and whatever I used of it, that would be for the storage on the boat.

Q. I am sorry. Whatever you used of the liquor would be compensation for the storage? A. Yes.

390 Q. Do I understand from that that you were authorized to use that liquor for your own purposes?

A. If I wanted some, yes.

Q. You did in fact agree to have this liquor transferred or placed aboard your boat? A. Yes.

Q. Which boat was it? A. The White.

Q. The Vincent A. White? A. Yes.

Q. That is a schooner that you previously identified? A. Right.

Q. What happened to this liquor when it was placed aboard this schooner? A. It went back to Halifax or Lunenburg, Nova Scotia.

Q. No, I say what happened to the liquor? A. The boat went back with the liquor on.

Q. Was any of it ever unloaded? A. Not to my knowledge, no sir, not to the best of my knowledge.

Q. That is the liquor which you carried at the request of Mr. Sausser? A. Yes.

391 Q. Was any attempt made to your knowledge to unload any of this liquor? A. Some boats went out once or twice, but they never could make contact.

Q. Were you present when these boats went out or when they returned? A. Sometimes I would be, yes, sir.

Q. Who was making the arrangements for these boats to go out? A. Well, I would if I would attempt to get some of my own in.

Q. Was Harry Sausser ever present when these boats went out? A. Probably once or twice.

Q. What about Frank Costello? Was he ever present when these boats went out? A. Maybe once or twice he was, but he was there with Harry Sausser once or twice.

Q. Frank Costello was there with Harry Sausser once or twice? A. Right.

Mr. Robson: I have no further questions of this witness.

The Court: Just to clear up something in my
392 own mind. Was that liquor on the boat when you first saw it or on the land? Where was the liquor? Had it been landed or not?

The Witness: No, it was still out in the ocean.

The Court: Still out in the ocean?

The Witness: On another boat.

The Court: On another boat?

The Witness: The boat was practically empty, and he wanted to put it on my boat to store.

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Cross-Examination By Mr. Williams:

Q. In other words, Mr. Kelly, you're talking, if I understand your last response to the Court's question, about whiskey that was out at sea and which was being transferred to the Vincent A. White for shipment to Halifax?

A. No, for storage on the White.

Q. In other words, for storage at sea on the White?

A. Yes.

Q. Was the Vincent A. White at the time more
393 than 12 miles out at sea? A. Yes, sir.

Q. How far out at sea was it? A. A hundred miles.

Q. A hundred miles out at sea? A. Yes.

Q. And the transactions about which you have testified on your direct examination have been concerning the storage of whiskey on the high seas, whiskey which was being removed from one vessel to the Vincent A. White for storage on the high seas, is that correct? A. Yes, sir.

Q. And those are the only transactions about which you have given testimony in response to Mr. Robson's interrogation, is that right? A. Yes, sir.

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Redirect Examination By Mr. Robson:

Q. What was to be done with the liquor which was being stored on the Vincent A. White? A. Well,
394 it was to be stored there and Mr. Sausser was to go out and get it if he could and bring it in.

Q. Get it from where? A. From the White.

Q. Where was he to leave it when he was to get it?
A. Well, anywhere that he wanted to send the boat. He

could send it to Rhode Island, Connecticut or Massachusetts, New York, or anywhere.

Q. And bring it back to Massachusetts or New York?

A. Well, wherever he wanted the boat to take it.

395 Q. The arrangements were, as I understand it,
that whiskey was to be transferred from a ship out
at sea to your chartered ship, the Vincent A. White,
396 is that correct? A. Yes.

Q. And it was to be placed on board the White
and stored on there by you? A. Yes.

Q. What was to be done with this whisky after it was
stored on the Vincent A. White? What arrangements
were to be made? A. It was to be stored on there subject
to his withdrawal of it.

Q. What do you mean by "subject to his withdrawal
of it"? A. Well, he could send out and get it if he wanted
it, or whatever he wanted to do with it. It was to be left
right there for his use.

The Court: He could get it any time he wanted
397 to send a boat out for it, is that right?

The Witness: Yes.

The Court: But he did not succeed in getting a boat
and making the contact?

The Witness: To my knowledge, no.

Q. But he did speak about sending some boats out while
you and Costello were present, is that correct? A. I
presume he did. I don't know. I don't know if he did
or didn't.

Q. Didn't you testify that you were present on a couple
of occasions when he did? A. I met him probably on only
one occasion when he was expecting some in, but it never
materialized.

Q. Where were you at the time you met him? A. I
think it was Greenport.

Q. Is that in the United States? A. Yes.

Mr. Robson: No further questions.

Recross-Examination by Mr. Williams:

Q. Mr. Kelly, my recollection of your testimony—and you correct me if I am in error, sir—is that you met Mr. Harry Sausser in 1925; I think you said two or three months prior to your arrest or indictment? A. Yes, sir.

398 Q. And at the time that you met him Mr. Costello was present? A. Yes.

Q. Is that the only time that you had a conversation with Mr. Sausser at which Mr. Costello was present? A. Well, I can't recall now whether he was there at other times that I met Mr. Sausser, but I met Costello a couple of times with Mr. Sausser. What the conversations were I don't know at this time.

Q. Well, you said that you did have a conversation with Mr. Sausser concerning the transfer of some whisky from a vessel on the high seas to the Vincent A. White? A. Yes, sir.

Q. Now, do you know whether Mr. Costello heard that conversation? A. No, I would not know that.

Q. Do you recall whether that conversation took place at a time when he was present? A. I would think so.

Q. Well— A. I think I met Mr. Sausser and Mr. Costello at the same time.

Q. I understood that you met them for the first
399 time at the same time. A. Right.

Q. Now I am asking you about the transfer of whisky. Do you recall whether the defendant in this case was present at that time? A. When the transfer was made?

Q. Yes. A. I don't think anybody was there.

Q. Well, you had a conversation with Sausser concerning the transfer? A. Yes, and I just told him it was all right.

Q. Was the defendant Costello present at that conversation? A. I wouldn't know, sir.

Q. You don't know? A. To the best of my knowledge I don't know. I don't recall.

Q. Well, isn't it a fact that you don't recall any conversation, Mr. Kelly, with Mr. Sausser, concerning the transfer of whisky, at which Costello was present? A. I don't remember now, no, sir. That is 35 years ago.

Mr. Williams: I have no further questions.

400 Redirect Examination by Mr. Robson:

Q. Mr. Kelly, the first time you met Mr. Sausser Mr. Costello was with him, is that correct? A. Yes, sir.

Q. And you had a conversation with Mr. Sausser at that time, did you? A. Yes, sir.

Q. And Mr. Costello was present at that time? A. Yes, sir.

Q. And this meeting was for a specific purpose; or was it just an accidental meeting? A. No, Mr. Coffey asked me would I come down to meet somebody, and I came down to Montauk and met Mr. Sausser.

Q. Was it at the first meeting that you made the arrangements to transfer the whisky? A. The first meeting was when Mr. Sausser asked if he could transfer it.

Q. And Mr. Costello was present at that meeting? A. I believe so, yes.

Recross-Examination by Mr. Williams:

Q. Was he present throughout the whole meeting, Mr. Kelly? A. I don't remember, sir.

401 Q. Are you able to say, Mr. Kelly,—and this is important and I am going to ask you to think back as best you can—are you able to testify that Mr. Costello was present and within hearing at the time you made the arrangement you testified about with Mr. Sausser? A. Oh, I couldn't say, no sir. The first time I met Mr. Sausser Mr. Costello was with him, and he asked me at that time could he transfer some merchandise.

Whether Mr. Costello was in hearing of it, I think it was in an automobile. I don't recall.

Q. Well, are you able to remember your conversation with Sausser on the subject about which Mr. Robson has been heretofore questioning you; namely, the transfer of the whisky, and whether your conversation was heard by Costello? Are you able to say that? A. No.

The Court: Where did the conversation take place?

The Witness: At Montauk Point.

The Court: In the morning or in the evening?

The Witness: To the best of my knowledge I don't remember.

The Court: Where did you meet the defendant? Was it at a bar, or a restaurant, or where you ran into him with Sausser on the first occasion?

402 The Witness: I came to Montauk and I was introduced to him, but where I don't know now.

The Court: You don't know where?

The Witness: No, sir.

By Mr. Robson:

Q. What is your best recollection, however, at this time as to where you all were, or whether you were all together or not when this conversation took place? A. At Montauk Point.

Q. Is it your best recollection that you were all together or not? A. If we were all together?

Q. Yes. A. Yes.

Q. That is your best recollection? A. Yes.

The Court: Did you have any discussion with Mr. Costello about taking any of his merchandise on board the boat?

The Witness: No, sir.

The Court: You did not enter into that conversation with him at all?

The Witness: No, sir.

402-a The Court: All right. How did Mr. Sausser pay you?

The Witness: There was no pay.

The Court: There was no pay!

The Witness: No, sir.

The Court: You did it just as a favor?

The Witness: Yes.

403 Recross-Examination by Mr. Williams:

Q. The last thing Mr. Robson asked you was when you were together. You were together when you met him, is that right? A. Yes.

Q. But you have no recollection as to whether all three of you were together when you conferred with Mr. Sausser concerning the whisky? A. No, sir.

Mr. Williams: That is all I have, your Honor.

Redirect Examination by Mr. Robson:

Q. We may be going back over the same ground, but let us start from the beginning now, Mr. Kelly.

You met Mr. Sausser and Mr. Costello for the first time while they were together, is that correct? A. Yes, sir.

Q. You met them at somebody's request for a specific purpose, is that correct? A. No, I met them not for a specific purpose at the time. They just wanted to ask me to come down there at that time.

Q. You met them pursuant to a specific request,
404 then, is that correct? A. Yes.

Q. And you went down pursuant to this request and you were introduced to Harry Sausser and Frank Costello, is that correct? A. Yes.

Q. When you arrived there you were introduced to Harry Sausser and Frank Costello, is that correct? A. Yes.

Q. And thereupon something was said, is that right? A. Yes.

Q. What was said when you were introduced? A. Harry Sausser, after we were introduced, asked could he put some stuff on my boat, liquor on my boat.

405 Q. You don't recall exactly where this meeting took place? A. No.

Q. Is this about the first thing that was said when you were introduced to him? A. Well, I suppose there was regular greetings and introductions, and then probably Mr. Coffey said—might have said that Sausser was interested in putting some merchandise on my boat. I don't know; I don't recall any—

Q. This was when you were introduced to Sausser and Costello, is that correct? A. Yes.

Q. Was there any reason for you to believe that Mr. Costello may have walked away after this introduction or is it your recollection that he stayed there after the introduction? A. I don't know. He could have walked away, he could have stayed there; I wouldn't know that. I met the two gentlemen and there it was. I don't know how to answer you otherwise.

Q. What is your best recollection? A. To what, sir? Was he there?

406 Q. Yes. A. When Mr. Sausser asked me?

Q. Yes. A. I would think that we were all together, yes, sir.

Q. Your best recollection is that you were all together? You were all together when you were asked to load this whisky? A. When the question was put to me, I would think so.

Q. Are you certain of that? Is that your best recollection? A. No, I am not certain.

Q. Are you certain that that is your best recollection? A. Yes.

Mr. Robson: No further questions.

Recross-Examination by Mr. Williams:

Q. Do you have a recollection, Mr. Kelly, or are you making a surmise? Do you know what I mean by a surmise?

A. Well, I—

Q. Do you have any recollection of this sir? A. No, sir.

407 Q. You have none? A. No.

Q. What are you doing, giving us your best guess as to what happened? A. Well, I would say yes.

Q. You are giving your best guess? A. Yes.

Q. But you have no recollection of this event of 33 years ago; you are simply giving us a guess as to what happened, is that correct? A. Yes, that's right.

Q. And you have no—

* The Court: Do you recall that there was a day when you met down there at Montauk with Sausser and Costello?

The Witness: Yes.

The Court: You remember that definitely?

The Witness: Yes.

The Court: So that is not a guess. One moment you say it is a guess—

The Witness: Well, as I understand the question, it is a guess.

The Court: Well, you do have a definite recollection that you met Sausser and you met Costello down there at Montauk?

408 The Witness: Yes.

The Court: And you had a discussion down there with reference to taking care of some of his merchandise on your boat?

The Witness: Yes.

Q. But you are not able to say here this morning as to whether Costello was present during the conversation or not, are you? A. Definitely I would not say so, no. I don't remember whether he was there or walked away or went to the toilet or something else.

The Court: I think that is enough. The witness says he was there when they met and he does not know whether he stayed there the whole time or not. I think that is the substance of it.

When did you next see Costello and Sausser again after that?

The Witness: I don't know, sir.

The Court: When did you finally wind up your transaction with Sausser?

The Witness: After the indictment the boat went back and that was the end of it.

409

Harold Kapner

called as a witness by the Government, being first duly sworn, testified as follows:

Direct Examination by Mr. Robson:

Q. Mr. Kapner, by whom are you employed? A. By the United States Immigration and Naturalization Service.

Q. Pursuant to instructions of the office of the United States Attorney did you conduct a search of the records of various registrars' offices within the City of New York? A. I did.

Q. And will you tell us what offices you checked and what you checked for and what you found. A. I checked the County Clerks' offices of the Boroughs of Manhattan, Brooklyn, Queens and The Bronx for approximately the years 1920 to 1926 for specific real estate transactions on the part of the defendant.

Q. Did you check for transactions on the part of anybody other than the defendant? A. Yes, a corporation known as the Koslo Realty.

Q. Did you check for both records of conveyances as well as records of mortgages? A. Yes, I did.

Q. Will you tell us what records you found of conveyances first either from or to the defendant Frank Costello during the years 1920 to 1926. A. May I consult my notes?

Q. Yes. A. I found a conveyance from the Halsey Realty Corporation to Frank Costello in the Borough of Queens dated July 7, 1922.

411 Q. Go on. A. This same piece of property was

conveyed on April 24, 1923 by Frank Costello to Loretta B. Costello.

Q. Yes. A. Those were the only conveyances relating to Frank Costello personally that I was able to find.

Q. That is in all the four counties? A. All the four counties. Prior—let me amend that statement—prior to January 1, 1926.

Q. Did you locate any records of any mortgage transactions involving Frank Costello? A. No, none at all.

Q. What about Koslo Realty? A. Excuse me. May I again amend that statement?

When I say no, not at all, I mean again prior to January 1, 1926.

Q. Yes. These questions are all relating from the period 1920 to January 21, 1926. I am sorry. I asked you now what about the records relating to Koslo Realty Corporation. What if anything did you find? A. There is a record relating to a conveyance to Koslo Realty on December 3, 1924 in the Borough of Manhattan from a Samuel Beilin. This property was conveyed from Koslo to 666 West End Avenue Corporation on June 3, 1925.

Those were the only conveyances I could find relating to Koslo prior to January 1, 1926.

Mr. Robson: Will you mark this for identification, please.

(Marked Government's Exhibit 15 for identification.)

Q. Mr. Kapner, would you think back a moment and see whether you can recall any other transactions in 1925 involving Koslo. Do you recall one in The Bronx in August 1925? A. In The Bronx?

Q. Yes. A. Do you mean conveyances or mortgages?

Q. Conveyances. A. Conveyances? Will you bear with me for a few moments?

Mr. Robson: Surely. Will you mark this for identification.

(Marked Government's Exhibits 16, 17 and 18 for identification.)

413 The Witness: Yes, I am sorry.

On September 3, 1925 Koslo was the recipient of a conveyance from Mary C. Newell, and on October 29, 1925 they were the recipient of a conveyance from Clare Building Corporation. Both these conveyances occurred in The Bronx.

Mr. Williams: I am sorry.

The Witness: Both conveyances occurred in The Bronx.

Mr. Robson: Will you mark these for identification.

(Marked Government's Exhibits 19, 20, 21, 22 and 23 for identification.)

Q. Did you find any record of any mortgages given by or to Koslo Realty? A. Yes. On January 9, 1925 Koslo Realty was given a mortgage on the premises at 1802 Andrews Avenue in The Bronx.

Q. Did you find any other record of any transactions?

A. Yes. With reference to the previous convey-
414 ances there were mortgages agreed upon between Koslo and 666 West End Avenue Corporation. That was dated June 22, 1925.

On January 6, 1925 there was a mortgage entered into between Massel Realty Corporation and Koslo Realty with reference to the premises 1802 Andrews Avenue in The Bronx.

Cross-Examination By Mr. Williams:

Q. Mr. Kapner, I understand that you searched the records of four counties, Manhattan, Bronx, Queens—and what was the last one? A. Brooklyn.

Q. Brooklyn, for the years 1920 through 1926, is that right? A. Approximately, that's correct, yes.

415 Q. Was it through 1926, Mr. Kapner? A. No, through 1925.

Q. You found, did you not, a certificate of incorporation of the Koslo Realty Corporation in 1924, is that correct?

A. No, sir, I did not. I was not detailed for that particular purpose at this time.

Q. Well, you were looking for transactions of a real estate nature to which the defendant in this case was a party or to which his company was a party, is that right?

A. That's right.

Q. So that you were looking for transactions on which his name appeared or upon which Koslo Realty Company appeared? A. That's right.

Q. When you looked for the transactions of Koslo Realty Company did you first ascertain any of the facts concerning the formation of the corporation? A. No. As I said, not at the present time. That had been done in a prior investigation.

Q. Incident to your examination and investigation concerning the real estate transactions, did you
416 interview Mr. Samuel Beilin? A. With regard to these transactions?

Q. Yes. A. No.

Q. You did not? A. No, not with regard to these transactions.

Q. Did you interview him with respect to the Koslo Realty Company? A. I recollect being present at an interview with Mr. Beilin but I don't think it was in regard to any of the real estate transactions. If my memory serves me, it was in regard to obtaining his evidence in this particular case.

Q. But his evidence related to the real estate transactions, did it not? A. But I do not think we discussed the real estate transactions.

Q. Well, at the time that you went to see him, Mr. Kapner, having conducted an investigation on the real

estate transactions, you knew that he was an associate of the defendant in the Koslo Realty Company, did you not? A. Yes.

Q. And that was the purpose of your visit to him, to ascertain what evidence would be available to you
417 from him or whether he would be able to give you evidence, is that right? A. That's correct.

Q. Now you said that the first document that you found which related to a transaction to which the defendant was a party was a document which was identified as Government's Exhibit No. 15, which purports to be a conveyance of premises at 1729 Montgomery Avenue in The Bronx, is that correct? A. No, that is not correct.

Q. Which was the first one, Mr. Kapner? A. The one on Halsey Street. It was the one just before this one.

Q. They were marked out of order. I will hand you No. 16 then, Mr. Kapner. No. 16 is a conveyance to Frank Costello of premises on Halsey Street, is that right? A. That's right.

Q. Where is Halsey Street? A. In Astoria, Queens.

Q. From whom is that conveyance made? A. By whom?

Q. Yes. A. The Halsey Realty Corporation.

418 Q. And what is the date of that one? A. May 1, 1922.

Q. And I take it that you do not know the purchase price of that because that is not shown in the records. A. No. All that is shown in the records is the amount of internal revenue stamps.

Q. Is the address of the Halsey Street property given on this deed of conveyance? A. Yes, it is.

Q. What is that? A. 957 Boulevard, Long Island City.

Q. 957 Halsey Boulevard? A. No. Boulevard. That was the original name of that street, merely Boulevard.

Q. You say the original name of Halsey Street was Boulevard? A. No, of that particular street where the offices of Halsey Realty were located.

Q. What was the address of the premises which were

conveyed? A. I do not think it is shown on that conveyance.

Q. It is simply described by plot and lot, is that correct? A. That's correct.

Q. Now thereafter on the 11th day of August 1922 there was a further conveyance of these premises from the defendant to his wife, is that correct? A. That's right.

Q. Now the first transaction that you found with respect to the Koslo Realty Company was dated June 22, 1925, is that correct? A. No, that is not correct. The first one was in December of 1924.

Q. Well, you found, did you not, a deed from Samuel Beilin to the Koslo Realty Company dated December 3, 1924? A. Right.

Q. And that was on a building which was on 92nd Street, isn't that so? A. That's right.

Q. That was an apartment building, wasn't it? A. I don't know.

Q. You did not pursue your examination further to find out what kind of a building it was that was conveyed? A. No, sir, I did not.

Q. Now thereafter the Koslo Realty Company conveyed that building to a corporation known as the 666 West End Avenue Corporation, is that correct? A. That's correct.

Q. And that was done on June 23, 1925, is that right? A. Correct.

Q. At the time that this property was conveyed to the corporation known as 666 West End Avenue Corporation, Beilin and Costello were the officers of the Koslo Realty Company, were they not? A. Not to my knowledge.

Q. Well, you had an examination or an interview and the benefit of an interview with Mr. Beilin, did you not? A. Yes, I was present at an interview with him, that's right.

Q. You had the benefits of an interview with him con-

cerning his association with Koslo, didn't you, whether it was in the form of a written memorandum of
 421 someone else's interview or your own presence, did you not? A. That's right.

Q. And so you had the information, did you not, that Mr. Beilin and Mr. Costello were the owners of the Koslo Realty Company at the time that this conveyance was made to 666 West End Avenue Corporation? A. No. As I told you before, Mr. Williams, I do not recollect the context of the interview with Mr. Beilin at which I was present because, as I said previously, I do not think the basic purpose was to inquire into the real estate transactions. It was merely to ascertain whether or not he could appear as a witness.

422 Q. Now, did you locate in your search of these real estate records, Mr. Kapner, a purchase money mortgage running from 666 West End Avenue Corporation to the Koslo Realty Corporation? A. Yes, sir.

Q. What was that date, sir? A. June 22, 1925.

Q. I am talking about the purchase money mortgage. Did you produce that document? A. No.

Q. Well, did you not find in your search of the records, Mr. Kapner, this purchase money mortgage running from 666 West End Avenue Corporation to Koslo Realty Company? A. Well, yes, that is the one I have just testified to.

Mr. Robson: He testified about that.

Q. You don't have a copy? A. I don't have a copy of it.

Mr. Williams: Do you want a copy put in so that the transaction will be completed?

(Mr. Robson hands to clerk.)

(Marked Government's Exhibit 24 for identification.)

423 Q. Now, were you able to ascertain the amount of that purchase money mortgage, Mr. Kapner, from your search of the records? A. I don't have it in my notes,

But if I recollect correctly, it was approximately \$40,000. If I remember correctly, yes.

Q. Now, did you find in your search of the New York County records a document showing a satisfaction of that mortgage running from 666 West End Avenue Corporation to Koslo? A. Well, my notes show that that mortgage was discharged December 24, 1925.

Q. Yes. Did you get a copy of that particular document? A. No, sir, I did not.

Mr. Williams: Do you want that to complete the record of this transaction?

(Mr. Robson hands to clerk.)

(Marked Government's Exhibit 25 for identification.)

Q. Now, all of the documents about which we have been talking the last few minutes were documents which were found in the New York County Recorder's office, is that not so? A. That is right.

424 Q. Now, in the Bronx County Recorder's office you found a conveyance or a record of a conveyance running from Clare Building Corporation to the Koslo Realty Corporation, is that correct? A. Yes, sir.

Q. And that was on two lots in the Bronx, is that correct? A. Yes.

.

Q. Now, Mr. Kapner, did you pursue your examination or your investigation concerning those conveyances to ascertain the lots that were involved, the address of the lots? A. I am sorry, I don't understand your question.

Q. Well, all right, I will rephrase it for you. Did you find out during your investigation of these real estate transactions of the Koslo Realty Company that these lots
425 were on Nelson Avenue in the Bronx? A. Yes, I do know that they were on Nelson Avenue in the Bronx.

Q. Nelson Avenue at what street? A. If I recollect, West 167th, if I am not mistaken.

Q. And did you ascertain that when those lots were purchased there were unfinished apartment houses on the lots which were acquired by the Koslo Realty Corporation?

A. No, sir, I did not.

Q. You didn't find that out? A. No, sir.

Q. Did you ascertain that the Koslo Realty Corporation spent in the year 1925 \$300,000 to complete those apartment houses? A. No, sir, I did not.

Q. Well, have you ever had access, Mr. Kapner, to a memorandum of interview with Mr. Beilin? A. Yes, I have had access to that memorandum.

Q. Yes? A. Yes, I have.

Q. Have you read such a memorandum? A. Not to my recollection.

426 Q. You didn't read it? A. No, sir.

Q. Well, during your examination and investigation into the real estate transactions of the defendant and Koslo Realty Corporation, didn't you attempt to get all the information that you could concerning the real estate transactions? A. This examination and investigation of the real estate transactions was not exclusive with me.

Q. Who else worked on this, Mr. Kapner? A. Mr. Solomon.

Q. Mr. Solomon? A. Yes.

Q. He also worked on the real estate investigation? A. Yes. Mr. Solomon, as I recollect, interviewed Mr. Beilin.

Q. Now, did you ascertain, Mr. Kapner, that the apartment houses which at the time of acquisition by Koslo were unfinished, were in fact completed by them?

427 A. Not as a result of this particular phase of the investigation.

Q. Well, regardless of what phase of the investigation it was; you learned that, didn't you, in your examination of

the real estate facet of this case? You so testified a moment ago? A. That is correct, yes.

Q. Yes. We have already established that you
428 knew, Mr. Kapner, that at the time the Koslo Realty Corporation acquired the lots at 167th Street, that there were unfinished buildings on those lots, is that right? A. That is right.

Q. Now, my question is whether or not your examination and investigation showed whether those buildings were finished by Koslo, were completed by Koslo? A. My investigation did not show it.

Q. Did not? Did you find a record of the sale of those lots by Koslo with improvements? A. No, sir, because that was long after the period of time in which we were interested. My investigation terminated on January 1, 1926, as I testified previously.

Q. So you didn't find any record of the sale of those lots with improvements on July 29, 1926? A. Not in this particular phase of the investigation, no.

Q. Well, regardless of what phase the investigation was in, did you find such a record, Mr. Kapner? A. Would you repeat that question again?

429 Q. Did you find at any time incident to your function in this case a record or records concerning the sale of those lots with improvements by the Koslo Realty Corporation to the RGF Construction Corporation? A. I recollect several years ago during the course of previous investigations that I did find something of a similar nature, and I am hazy as to the exact details.

Q. Now I am going to show you two documents which were in the possession of Mr. Solomon, your associate, and which were just handed to me by Mr. Robson, and which I am going to ask to be marked for identification.

Mr. Williams: Can we continue the same chronology?

Mr. Robson: Yes.

(Marked Government's Exhibits 26 and 27 for identification.)

430 Q. Government's 26 and Government's 27 for identification. I am going to ask you, Mr. Kapner, whether you heretofore saw these conveyances. I hand you now No. 26 for identification and No. 27 for identification. A. Your question is, Mr. Williams, have I ever seen these conveyances?

Q. Yes. A. The answer is yes.

Q. Now, do those conveyances show, Mr. Kapner, that the premises were deeded by Koslo on July 29, 1926, to the RGF Construction Company with improvements on the lots?

434 Q. Yes, that is what I was asking. Do these show that the buildings were on these premises at the time of the conveyance? A. At the time of this conveyance, yes.

Q. And the same thing is shown on the other deed running from Koslo to RGF Construction Corpora-
435 tion, is it not? A. That is correct.

Q. Those have been marked, have they, Mr. Witness, 26 and 27? A. That is right.

Q. Now, you said that you found conveyances from Mary Newell, from Mary or Minnie Newell to the Koslo Realty Company, is that correct? A. That is right.

Q. When were they, sir? A. Mary Newell was September 3, 1925.

Q. Now, where were those premises which were conveyed, Mr. Kapner? A. The location?

Q. Yes. A. I am sorry, I can't tell you that offhand.

Q. It is not reflected in your notes? A. No.

Q. Is it reflected in your notes, Mr. Kapner, what the nature of the real estate which was conveyed was? A. Not in my notes.

Q. Whether they were buildings? A. No, sir.

436 Q. You have no record of that? A. No, sir.

Q. Now, did you find a subsequent transaction from Koslo Realty Corporation to the Rosenbloom Realty Corporation, in which the real estate conveyed by Minnie Newell was subsequently conveyed by Koslo Realty Company? A. No, sir, I did not.

Mr. Williams: Do you have such a document, Mr. Robson?

(Mr. Robson produces document.)

(Marked Government's Exhibit 28 for identification.)

Q. I am going to hand you what has been marked Government's Exhibit 28 for identification and ask you if you, Mr. Kapner, were the investigator who found that transaction? A. Yes. This was obtained several years ago.

Q. By you? A. Yes, sir.

Q. So that you did have some information concerning the transfer of the Mary Newell property by Koslo to Rosenbloom Realty Corporation, is that right? A. As of several years ago, but not in this immediate
437 phase.

Q. Well, I don't want you to departmentalize your knowledge, Mr. Kapner. I am not asking you what you learned with respect to each phase of your investigation; I am asking you about all your knowledge of these transactions.

The Court: Well, you ask him the question.

Q. So you did learn that these properties were sold later? A. Yes, sir.

Q. By Koslo? A. That is correct.

Q. Did you learn that they were the same properties that they acquired in September 1925? A. That is right.

Q. And they were conveyed on what date? A. June 22nd.

438 Q. They were conveyed on June 22, 1926, is that right? A. Yes.

Q. And that is both lots and both buildings, all the real estate acquired from Mary Newell? A. I couldn't answer that question unless I was able to compare it to the original conveyance of Mary Newell.

Mr. Robson: I will concede, your Honor, that the records indicate that the property was subsequently conveyed.

442 Q. Didn't you learn, Mr. Kapner, prior to your going out and looking for Koslo Realty Corporation transactions that Costello had been engaged in the Koslo Realty Company? A. That's right.

443 Q. Now, with respect to the last transaction about which you testified, the Massel Realty Corporation—

Q. What did you find, Mr. Kapner? A. I found a mortgage agreement between Massel Realty Corporation on January 6, 1925 and Koslo Realty concerning premises at 1802 Andrews Avenue in The Bronx.

444 Q. Did you find out the amount of that mortgage? A. No, sir, I don't have it down in my notes.

Q. That was in January 1925? A. That's correct.

Q. Now, did you make any investigation concerning either Babylon Waterfront, Inc. or White Homes Inc.? A. My investigation was conducted several years ago in regard to this case.

Q. And the White Homes Inc.? A. Yes.

Q. Did you find that the defendant was associated with these companies? A. To my recollection he was.

Q. He was an officer? A. I don't recall exactly what the association was.

Q. They were real estate companies, were they? A. They were realty companies.

459 Mr. Robson: Before I start, I thought it might
be a good idea to introduce in evidence some of
these documents, Mr. Williams having no objection, the
record of the real estate transactions.

Mr. Robson: Government's Exhibit 15 for identification
is a deed between Frank Costello to Loretta Costello,
460 premises on Halsey Street in Astoria.

Government's Exhibit 16 for identification is a deed
from Halsey Realty Company to Frank Costello of the
same premises in Halsey Street, Astoria that is covered
by Exhibit 15.

Exhibit 17 is a deed from Koslo Realty Company Inc. to
666 West End Avenue Corporation covering property on
92nd Street and West End Avenue.

Government's Exhibit 18 is a deed from Samuel and
Anna Beilin to Koslo Realty on December 1, 1924, covering
property on West End Avenue and 92nd Street.

Exhibit 19 is a deed dated August 12, 1925 conveying
from Mary C. Newell to Koslo Realty property of the
Coster estate located in The Bronx.

Exhibit 20 is a deed from Minnie R. Newell dated August
12, 1925 conveying adjoining piece of property from the
Coster estate to Koslo Realty.

Exhibit 21 is a deed from the Clare Building Corporation
to Koslo dated October 26, 1925, conveying property on
Nelson Avenue in The Bronx.

Exhibit 22 is another deed dated October 26, 1925 from
Clare Building to Koslo Realty Corporation also on Nelson
Avenue in The Bronx.

Exhibit 23 is a certificate of incorporation of Koslo
Realty Company Inc., indicating its filing on De-
461 cember 2, 1924.

Exhibit 24 is a mortgage dated June 22, 1925 from
the 666 West End Avenue Corporation to the Koslo Realty
Corporation covering parcel on West End Avenue.

Exhibit 25 is a satisfaction of the mortgage from 606 West End Avenue Corporation to Koslo Realty dated December 24, 1925.

That is all.

The Court: Received in evidence, Exhibits 15 to 25.

463 Mr. Robson: This is a deed of Loretta Costello to premises 1802 Andrews Avenue, indicating that she resides at that address.

464 The Court: All right. Received in evidence as Government's Exhibit 29.

Mr. Williams: Your Honor, in the light of the colloquy we just had about defense exhibits, I would like to offer as defense exhibits what have heretofore been identified as Government's Exhibits Nos. 26, 27, and 28. May they be marked as defense exhibits A, B, C?

Conveyance from Koslo Realty to R.G.B. Construction Company is Defendant's Exhibit A; conveyance from Koslo Realty to R.G.B. Construction Company is Defendant's Exhibit B. That is another piece of property between the same parties. Exhibit 28, which now becomes Defendant's Exhibit C, is a conveyance from Mary Newell to Koslo— from Koslo Construction Corporation to Rosenbloom Realty Company.

And in order, your Honor, to complete the record on these transactions, I just asked Mr. Robson if I might offer at this point as D and E the two certificates of incorporation on Babylon Waterfront Inc. and White Homes Inc., if he has no objection.

465 (Government's Exhibit 26 for identification marked Defendant's Exhibit A in evidence.)

(Government's Exhibit 27 for identification marked Defendant's Exhibit B in evidence.)

(Government's Exhibit 28 for identification marked Defendant's Exhibit C in evidence.)

(Two certificates of incorporation marked Defendant's Exhibits D and E in evidence.)

Mr. Robson: At this time I would like to offer into evidence to the extent that I shall read from it and to the extent that Mr. Williams will read from it a deposition taken on December 30, 1958 of a Miss Helen L. Sausser. This was taken pursuant to notice and was attended by a representative of Mr. Williams.

466 Mr. Robson: On page 1:

"Q. Where and when were you born, Miss Sausser?

"A. I was born in Mimico, Ontario in 1907, October 10th.

"Q. And what was your father's name?

"A. Harry C. Sausser.

"Q. Now, after your birth, for how long did you continue living in Ontario, do you recall?

"A. Oh, three years—three or four years.

"Q. And where did you move to then?

"A. We moved to Detroit.

"Q. And how long did you live in Detroit?

"A. Oh, I lived there until I was around 12 years old.

"Q. That would be 1919?

467 "A. Right, yes.

"Q. Was your father employed while you lived in Detroit?

"A. Yes, he worked for the railroads.

"Q. Do you know what railroad he worked for?

"A. Oh, there was the Wabash, the Michigan Central, the Grand Trunk. I don't remember the Pere Marquette or not, but at that time it went in there.

"Q. What sort of work did he do?

"A. He was a yard master."

Page 2:

"Q. And where did you go when you left Detroit?

"A. We went to Florida. Jacksonville and then Miami.

"Q. How long did you remain in Florida?

"A. Oh, we went down in January, and my mother and I returned to New York City in April.

"Q. What year was that—1920?

"A. That would be 1920.

"Q. While you were living in Florida was your father employed?

"A. No."

Page 3:

"Q. And then where did you live?

468 "A. Well, we moved from there, and we had a furnished apartment on West 71st Street between Broadway and Columbus.

"Q. How long did you stay at that furnished apartment?

"A. Oh, we must have been there almost a year, I guess.

"Q. During that year was your father employed?

"A. Well, he was doing something, but he wasn't employed by the Government.

"Q. Do you know what he was doing?

"A. Well, from what I heard mentioned, he was apparently in the bootlegging business."

469 "Q. When you say 'from what you heard mentioned' from whom did you hear this mentioned?

"A. Well, at that time he had been associated with a man by the name of McCord from Detroit—John McCord.

"Q. And were these conversations that you heard between your father and McCord that you are referring to when you say 'from what you heard'?

"A. Yes,"

473 "Q. Now, after you left the furnished apartment where did you live?

"A. We bought a house on North Broadway in White Plains.

"Q. And how long did you remain there?

"A. Oh, let's see. About three years, I would say—three years.

"Q. Was your father employed during that three-year period?

"A. No.

"Q. Do you know what he was doing for a living?

"A. He was still associated with John McCord and in the bootlegging business."

475 Mr. Robson: On page 4:

"Q. Did you ever have occasion to travel anywhere with your father while you were living in White Plains?

"A. Yes, we used to—if I wasn't going to school, why, I sometimes—my mother and I, and John McCord and his wife, we would go up to Montreal, and usually drove to Montreal. I can remember several occasions being there.

"Q. Were these purely social trips?

"A. No, they were apparently from a business angle.

"Q. And what sort of business?

"A. Well, as I recall, there was always whiskey or bootlegging connected with it.

476 "Q. And can you recall in what way whiskey was involved in these trips?

"A. Well, because of years of association with the railroad my father had a way of being able to get cars across the border. They were apparently—the whiskey or whatever—whiskey or wine, whatever it was—was purchased in Canada and then brought across to the States.

"Q. And your father was making arrangements for these shipments?

"A. Yes, that's right.

"Q. Now, you stayed in White Plains then until June in 1923?

"A. Yes, I would say around 1923.

"Q. And then where did you go, or where did you live?

"A. Well, we moved to Freeport. We stayed in Freeport, Long Island, and we stayed in a house that had been rented by the McCords. We sold our place.

"Q. And how long did you remain in that house which was rented by the McCords?

"A. Oh, I don't know—probably three or four months maybe, it seems to me. It might have been longer.

477 "Q. And were your father's activities during that three or four months the same as they had been prior to your moving there?

"A. Yes. Yes, it was the same idea, but he was having a little trouble with this John McCord. He was a little hard to get along with to the extent that he had become quite a drinker, and he was just not reasonable, and he was having a little trouble with him."

Mr. Robson: At the bottom of page 5:

"Q. Where did you live after you left this house in Long Island in Freeport?

"A. Well, we moved back to—was it? Let's see. I can't remember whether—I think we went back to 72nd Street in a small furnished apartment there.

"Q. And how long did you live at that address?

"A. Just a few months—not very long.

"Q. And then where did you move to?

"A. Then we moved into a house that was out on Long Island.

"Q. Do you remember where that was?

"A. Commack was the name of the place.

"Q. Is that Commack?

"A. Yes.

478 "Q. How long did you live in Commack?

"A. Oh, a year or so.

"Q. This would have been from when—about the latter part of 1924?"

Mr. Robson: Then there was an objection by Mr. Fuller: "Let's not lead."

Mr. Robson: Now page 7:

"Q. Well, roughly, what was the period during which you lived in Commack?"

"A. We were there in the Summer, and we were there in the Winter time.

"Q. Of what year?"

"A. It was in 1924, I think.

"Q. And were you there during any part of 1925?"

"A. Well, let's see. It would have been starting in 1925, I would say.

"Q. Well, let me ask you this. Do you recall your father having been arrested and indicted for bootlegging?"

"A. I didn't know anything about it. I had heard about it, and I think it was in the papers, but I mean—

"Q. Well, do you recall when that was?"

"A. (No response.)

479 "Q. Do you recall with relation to this arrest and indictment that you had heard about or was in the papers—do you recall your residence in Commack in relation to that?"

"A. Yes, I do. I remember one instance where he came home—he had been gone all night, and he came home and changed his clothes, and left the house, and said at the time that he had to go into New York City, and he had to go to court. Now, that could have been the time he had to appear in court.

"Q. So that you were living in Commack at the time that he was under indictment, is that right?"

"A. Yes, I would say so. I know we lived in Commack at the time that this incident happened because it was on the estate on Long Island where they had had the trouble.

"Q. If the record showed that indictment was obtained

in January, 1926, would that refresh your recollection about approximately the time you were living in Commack?

"A. Well, I am not sure on that date because it seems to me it was earlier than that.

"Q. Do you know Frank Costello?

"A. Yes, I have seen him and I have been in his company.

480 "Q. When did you first meet him, do you recall?

"A. Well, that was during the period that we lived in Commack.

"Q. Was it during the early part of the period that you lived there?

"A. Yes.

"Q. Miss Sausser, I would like you to look at a duplicate of the Government's Exhibit 4 for identification dated December 11th, 1958, In The United States District Court, Southern District of New York, and ask you if you can identify the man you knew as Frank Costello on that picture?

"A. Yes, this man over here in the upper righthand corner (indicating on exhibit)."

Mr. Robson: May we have a concession that the witness has identified Frank Costello as appearing in the upper righthand corner of Government's Exhibit 4?

Mr. Williams: Yes.

Mr. Robson: Now at page 9:

"A. Yes. And that is my father.

"Q. That is right in front of—

481 "A. Bobbie.

"Q. He was seated right in front of your father?

"A. That's right. This is my mother (indicating)."

Mr. Robson: May we have a concession that the witness has identified her father as the gentleman appearing in this photograph, Government's Exhibit 4 in evidence, she having identified that gentleman as her father?

Mr. Williams: Yes.

Mr. Robson: Mr. Williams so concedes.

On page 10:

"Q. On how many occasions did you see Frank Costello approximately?

"A. Well, when we lived in Commack there was two or three weekends that they had sort of a gathering at our place. It was a very large house, and the men would come out—the men and their wives and so forth—would come out and they would play cards. Frank was usually there. In fact, I guess the two or three times I can recall, he definitely was there. I think probably it was a social time more or less, being as far as the men were concerned they spent most of the time playing cards.

.

484 "Q. Outside of these social get-togethers, did you ever see or meet Frank Costello at your house?

"A. Not that I can recall. We went to Frank Costello's house when we were in Bayside, and he lived in Bayside at the time.

"Q. When was this?

"A. That must have been the latter part of 1925. My father died in 1926. And it was in 1925—along in 1925.

"Q. By the way, do you know when your father met Costello for the first time, approximately?

"A. No, I really don't. It must have been during that period just before we moved to Commack because financially things seemed to have gotten better as far as we were concerned. I mean, our own family."

.

485 Mr. Robson: On page 11:

"Q. Had you ever heard your father mention Frank Costello, or had you ever met Frank Costello or heard of him from your father prior to this period shortly before you moved to Commack?

"A. No, because I definitely did know Frank came into the picture in Commack. I mean, that was the first I was aware of Frank Costello.

"Q. Now, did you ever have occasion to go to any office which your father used or Frank Costello used?

"A. Yes. I used to, when I lived in Commack—I used to go into New York. Being at the age I was then I liked to go to New York and shop. And sometimes we
486 would go to a matinee in the afternoon. And maybe when I would decide to do it my father just didn't have all the money I thought I should have for this escapade or this afternoon's entertainment, and he would say, 'Why don't you stop up at the office? I will give you money then after you get into New York.'

"Q. Where was this office?

"A. It was in the Long Beach Building, and it is on Madison Avenue, isn't it?

"Q. Madison or Lexington?

"A. I don't know. I have got to think of the streets. Lexington.

"Q. What street on Lexington?

"A. Well, right there I can't say definitely, but I know it was near or around the Roosevelt and the Commodore. Those hotels were right around it somewhere, but I can't tell you the number of the street.

"Q. Do you remember the address, by any chance?

"A. No.

"Q. Was it near 42nd Street, do you remember?

"A. Yes, it was near 42nd Street.

"Q. Did you ever see anybody else up in this office besides your father?

487 "A. I saw—well, this Bob Ellis. He was sort of a bookkeeper or something like that. Quite often he gave me the money."

489 The Court: Continue with your reading.

Mr. Robson: The rest of the answer is:

"I don't remember seeing—or I could have seen other people. I saw that Bill Bleek there and—as to having seen Frank, I can't remember. He was probably there, but I just actually don't recall it."

"Q. How did you know that your father was in the same business with Costello and they were using the same office?

"A. Well, I had heard him make remarks at home that he would see Frank in the office, or maybe he was talking to him on the phone and he was going to see Frank at the office. And that I do remember definitely. So I mean, as I recall now, definitely Frank was there. He must have been there."

Mr. Williams: I object to that, your Honor, as
490 being clearly hearsay, what her father told her at home about having seen the defendant at the office.

491 The Court: I say I am going to allow that to stand. That is not hearsay, and I deny your motion to strike.

Mr. Robson: This is on page 13:

"Q. Do you recall any conversations which indicated the nature of the business—"

Mr. Robson: There was an objection there by Mr. Fuller or an interruption by him, and I then added to the question:

"Q. At any time, I am talking about now—when I say 'recall' now, I am not referring necessarily to a specific conversation?

"A. Well, yes. I certainly—I mean, I definitely knew they were in the bootlegging business. Somewhere along the line I must have heard a conversation. And besides

things that had happened around this house in
 492 Commack. I mean, I had seen instances where there
 had been liquor, and Frank was associated with it,
 and so was my father."

497 "Q. What sort of instances, generally, if you can
 recall any specific ones—fine—if not, generally what
 sort of instances are you referring to?

"A. Well, I mean that was the one case that they brought
 some trucks in—large trucks—and these trucks had large
 aluminum cans on them. And those cans, which I found
 out later on, were removed from the trucks and stored in
 the barn that we had there, which actually was a barn
 but actually we used it for a garage for our car. And it
 was a large edifice, and these cans were stored in that
 barn. They had no labels on them. They were metal cans.
 But it was during a very cold period, and the next morning
 when we wanted to use our car, why, it was frozen up.
 So it was sort of a laugh about the house that the car
 should be frozen up when we had so much alcohol on the
 premises. Now, it was eventually—the car was
 498 thawed out, and some of that alcohol was put in
 the car. From that I know definitely that in those
 cans apparently was alcohol.

"Q. How did you associate Frank Costello with that
 shipment?"

"A. Well, there was a driver—I don't imagine he was
 a truck driver for Frank. But he was a large Italian man,
 And they stayed at the house. And he definitely mentioned
 Frank several times and working for Frank. So I mean,
 I knew that he worked for Frank, and from that and the
 contents of the cans, why, it just certainly must have been
 more or less bootlegging that they were in, and that is
 what was in the cans. And this person's name—
 499 his last name I am not sure of any more, but his

first name—he was called Tony which is a very common name with the Italian people. But by the same token, that is what his name was.”

.

“Q. Does the name Malillo refresh your recollection?

“A. Malillo strikes, I think—I am not sure of the pronunciation—but it does sound that way to me. As I recall, it was Malillo.

“Q. Would you recognize a picture if you saw it?

“A. Yes, I could recognize a picture.

“Q. Did you ever see this Tony in the company of Frank Costello?

“A. Not that I recall.

“Government’s Exhibit 1 marked for identification.

“Q. Would you look at Government’s Exhibit 1 for identification. Is that picture familiar?

“A. Yes. That is the man that I knew as Tony.”

.

501 Mr. Williams: My objection, your Honor, is that the whole answer is predicated upon information which she received from a man named Tony, and, therefore, is obviously hearsay.

.

502 The Court: Your objection is overruled and your motion to strike is denied.

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504 Mr. Robson: Page 16:

“Q. Were there any conversations, without you being able to recall any personally—were there any conversations?

“A. Well, there must have been conversations, definitely, because I mean, I knew that was what they were doing. And it was my father and Frank Costello.

“Q. Do you recall generally what the subject of these conversations were?”

505 Then Mr. Fuller objected and said:

"Mr. Fuller: I object now because she said she doesn't remember any conversations. She said there must have been some, but she doesn't remember there being any.

✓ "Q. Miss Sausser, I realize, of course, that we are going back more than thirty years, and I am not asking you to try to recall any specific conversations. But I am asking whether you can recall generally that there were conversations or that there were not conversations?

"A. Well, there were conversations. Let's put it that way. There were conversations.

"Q. Do you recall what the general nature of the conversations was without recalling? If not—if you can't recall what the specific content of them was?

"A. Well, they would talk about whether buying this type of whiskey was the right thing, and how much it was going to cost, or some place else where they could locate another type, and maybe that would be better but cheaper, and would move faster. That sort of thing—I heard that.

"Q. Over what period of time was this?

"A. Well, this was during the time that I lived in Commack, and also we had lived—later from Commack we lived in Bayside. And that was the latter
506 part of 1925.

"Q. Did these conversations take place at various periods during that entire time?

"A. Oh, yes. Yes, from any time during the period we lived in Commack, and then after we moved from Commack we went to Bayside. Frank owned a house in Bayside, and we used to go over there once in a while—maybe a Sunday dinner or something like that. There would be my mother and father, and Frank and Bobbie, and myself.

"Q. Incidentally, this picture, Government's Exhibit 4—do you know where that was taken?

"A. Yes, that was taken in Commack."

Mr. Williams: Your Honor, at this point I do not want to interrupt Mr. Robson reading that colloquy concerning the conversation, but I object to the conversation where she purports to testify, because when he was reading Mr. Robson omitted one question and answer which I think is necessary to a full understanding of the witness' testimony in this deposition. That question appears at page 16 of the deposition.

At page 16 of the deposition—page 15, I am sorry—

The Court: Yes, there was this question and
507 answer which was not read by Mr. Robson:

"Q. Now, I was asking you again about conversations. Getting back into the conversations between your father and Frank Costello, do you recall an incident—let me say, do you recall any other incidents generally describing him, or any other conversations which in any way related to whiskey?

"A. Well, later on after—I can't at this point remember any incidents. I mean, it was just generally known. And I knew it. I still was fairly young, and I wasn't particularly, shall we say, too curious because I didn't like the business in the first place, and I didn't want to be—I mean, I just didn't sort of want to associate with it."

Mr. Williams: And then I object to all these conversations which are further predicated—

The Court: You object to the last statement?

Mr. Williams: I am objecting, your Honor, to all of the conversations on the basis, number one, that she has testified that she has no recollection of any conversation. Then she says at page 16, in response to a question where Mr. Robson questions her about it again, and where she says:

508 "A. Well, there must have been conversations, definitely, because I mean, I knew that was what they were doing. And it was my father and Frank Costello."

You see, your Honor, her testimony I am afraid, like the testimony of a witness that came here this morning, is based upon something that they think must have happened, or what she has now been convinced had happened and she feels must have happened. Then she goes on and gives testimony based on that erroneous assumption, the entire effect of which is speculative as to what must have happened in 1924, 34 years ago, and she then gives instances about conversations in substance without recalling any specific conversation, and there has been no evidence whatever to show that there was any connection with the defendant, only she thinks that there must have been some.

Now, your Honor, I think that goes more than to the weight of the evidence; I think it goes more to the probative value of the evidence. I think this is nothing more or less than speculation about the events three and a half decades ago, when her recollection is absolutely blank.

Now, I don't think that kind of evidence ought to be permitted in a denaturalization case which the Government is trying, and where the Supreme Court has
509 time and again said that the evidence must be clear, unequivocal and convincing.

• • • • •
510 The Court: I have certain theories in connection with the deposition of this woman, and in some of these instances I think the woman was making a proper comment on the basis of the conversations that she heard.

Now, after all, she did remember that there were conversations; she did remember the general subject that was discussed, and on the basis of that I think that the woman might very well have said that she knew that there were such conversations. Those men would be around there and she would be sitting around, and they would not be just sitting there just blank. Certainly there were conversations. She said that she can't remem-

her the precise conversations, and that is a perfectly normal thing for a woman to say after thirty-five years. I overrule your objection.

Mr. Robson: Page 17:

"Q. Now, during the period that you—well, from 1919 when you left Detroit, until your father's death, was your father ever engaged in the real estate business in any way?

511 "A. Well, not actually. This office that they had on Lexington Avenue was supposedly a real estate office.

"Q. When you say 'was supposedly a real estate office' what do you mean?

"A. I mean by that they were using that as a front—as a cover-up. Actually, I don't think they ever did any real estate business whatsoever.

"Q. Did your father ever engage in the real estate business, to your knowledge?

"A. No.

"Q. Did you ever hear any mention by him of any real estate business?

"A. No.

"Q. Did you ever hear Frank Costello ever mention any real estate activity?

"A. No.

"Q. Now, your father is dead, is he not?

"A. Yes, he is.

"Q. When did he die, do you recall?

"A. In 1926."

Then we had Government's Exhibit 2 marked for identification, your Honor.

512 "Q. Miss Sausser, would you look at Government's Exhibit 2 for identification, the second sheet—the first is merely a certification—and tell me whether the individual described in that certification is your

father—or the information there appears to relate to your father.

"A. Yes.

"Q. Is all that information accurate insofar as your father's history is concerned?

"A. Yes, I would say so.

"Q. Now, your father died where?

"A. Windsor.

"Q. In Windsor, Ontario?

"A. Ontario."

514 "Q. And how long had he been in Windsor, Ontario when he died?

"A. Oh, I would say probably ten hours or so.

"Q. Ten hours?

"A. Yes.

"Q. Were you with him when he died?

"A. No, I wasn't.

"Q. You were not in Ontario at the time?

"A. No.

"Q. Do you know where your father had been prior to his arrival in Windsor, Ontario?

"A. Yes, he had been up in Nova Scotia.

"Q. And how long had he been up there?

"A. Oh, three or four months.

"Q. And prior to that three or four months period in Nova Scotia, where had he been?

"A. Well, that I don't actually know—where he was in that period. He was supposed to have been going to go to Europe in a boat."

Page 20:

"Q. Are you familiar with your father's signature?

"A. Yes, I am.

515 "Q. I show you Government's Exhibit 9 for identification dated December 11, 1958, United States District Court for the Southern District of

New York, and I ask you whether that is your father's signature on the bottom of the page.

"A. Yes, it is.

"Q. Before I ask you about that, did you have occasion to see your father in Canada at any time before he died?

"A. Yes.

"Q. Where was that?

"A. Mahone Bay.

"Q. Was that in Nova Scotia?

"A. Yes. It was a little way from Halifax.

"Q. Was anybody else there besides you and your mother?

"A. Yes, this Tony Malillo.

"Q. He was up there?

"A. Yes.

"Q. Had he been with your father when you arrived, or did he come ~~Ap~~?

"A. He came afterwards.

"Q. I show you Government's Exhibit 33 for identification and ask you if you can tell us what that is.

516 "A. This was a telegram that was sent to my mother after my father had died, and of which nothing ever came. Nothing ever came of it.

"Q. I notice this is signed 'Frank.' Do you know who that Frank is?

"A. —"

Mr. Williams: I object to the ensuing questions and answers, your Honor, but I suppose you will have to hear them before you rule.

Mr. Robson: (Reading)

"A. Frank Costello.

"Q. How do you know that that was signed by Frank Costello?

"A. Well, I would say definitely it is Frank Costello because in the beginning it mentions 'All the boys. All of the boys wiring you money.'

"Q. Did you have occasion to ever see Frank Costello again after your father's death?

"A. No, never.

"Q. Did he ever communicate with you?

"A. No.

"Q. Did you ever communicate with him?

"A. No."

518 Mr. Williams: I will agree that the objection I have just made is without merit if there appears on the wire what Mr. Robson had just stated, namely, that the White Homes Inc. telephone number is there as the telephone number of the sender.

Mr. Robson: It says "Telephone me at that number."

The Court: It says "Telephone Republic 4164 on arrival in New York."

Mr. Williams: I will withdraw my objection to the wire.

519 "Q. Just one or two more questions, Miss Sausser. Do you recall ever having been to a home or garage in Astoria, Long Island?

"A. Yes, I went down there with my father. As I understood at the time—as I recall later—there was a brother of Frank Costello's that owned that place, or had rented it. There was a house, and in back of the house there was a large—again a place that looked like a large garage or barn. Storage place, I would say.

"Q. Do you recall what the occasion was of your visit or your father's visit?

"A. No. He must have had some business to see with this man involved at the time. What it was I don't know.

"Q. Did you have occasion to go into the garage?

"A. No, I didn't go into the garage."

At this time I concluded my direct examination. The cross-examination began. I suggest that possibly the simplest way to handle it is for Mr. Williams to read what

he wants of the cross-examination and I will then read whatever questions on redirect I want to read.

520 Mr. Williams: (Reading)

"Q. Miss Sausser, you indicated that you lived in New York City in 1920, I believe?

"A. Yes, that is correct.

"Q. And you said that your father was acquainted with a John McCord?

"A. That's right.

"Q. Were you ever present at the time when Mr. McCord and your father had any conversations?

"A. Yes.

"Q. And it is from these conversations that you concluded that your father was engaged in bootlegging?

"A. That's right.

"Q. Did you ever ask your father if he was engaged in bootlegging?

"A. No.

"Q. Were you ever present when your mother asked him if he was engaged in bootlegging?

"A. Yes.

"Q. Did he admit he was engaged in bootlegging?

"A. Yes.

"Q. He did?

"A. Yes.

521 "Q. Do you recall in July of 1956 when you were met and interviewed by Mr. Gorman?

"A. Yes.

"Q. Isn't it a fact that at the time of that interview you indicated when you inquired of your father what occupation he was in—you told Mr. Gorman you really didn't know, and that your father would never indicate to you what occupation he was in?

"A. That was to me. He didn't indicate to me.

"Q. Isn't it also true that the same holds true to your mother's questions?

"A. Well, no. He talked to my mother at a different place than he talked to me.

"Q. So when you told Mr. Gorman that whenever you asked questions you got evasive answers—

"A. (Interrupting) That's right.

"Q. This is not related to your conversations, but somebody else's?

"A. I don't understand that exactly.

"Q. That whenever you asked your father what his occupation was, that you received evasive answers?

"A. Yes, that's right.

"Q. Now, were these conversations which you had or someone else had?

522 "A. When I asked my father he evaded answering the question. But if my mother asked him he didn't evade the question.

"Q. So you did ask him and he didn't tell you?

"A. He didn't tell me. He told my mother.

"Q. But he didn't want to tell you what he was doing?

"A. That's right.

"Q. You indicated that your family and the McCord family would on occasion drive to Montreal?

"A. That's right.

"Q. You further indicated that these were business matters?

"A. That's right.

"Q. Were you present at any time in Montreal when business was conducted by your father?

"A. No.

"Q. How do you conclude it was business?

"A. Because it was talked over in hotel rooms afterwards.

"Q. Were you present during all these periods?

"A. Not all the periods, but I certainly was around.

"Q. How old were you at that time?

"A. Oh, around thirteen.

523 "Q. Thirteen years old?

"A. Yes.

"Q. And you recall that at page thirteen—you recall conversations now that took place when you were thirteen years old—is that correct?

"A. That's right.

"Q. Miss Sausser, were you ever interviewed at a prior time by any representative from the Government relative to this matter?

"A. Yes.

"Q. And did you ever give the Government a statement?

"A. Yes.

"Q. And did you sign the statement?

"A. Yes.

"Q. Do you have any brothers or sisters?

"A. I have a half brother. I have a stepsister and a stepbrother.

"Q. How old is your half brother?

"A. My half brother is sixty-two years old.

"Q. What is his name?

"A. Latham.

"Q. Is he a child by your mother or by your father?

"A. He is a child by my mother.

524 "Q. So was your mother married previous to the time she married Mr. Sausser?

"A. Yes, my mother was. But her name was not Latham. He was adopted.

"Q. Do you know when your parents were married?

"A. Well, I was born in 1907. I don't know the year, no. I would have to figure it out. I can do it that way, if you want me to."

• • • • •
"Q. You mentioned before that you were present when conversations were conducted between your father and Frank Costello; is that correct?

"A. Yes.

"Q. But you do not recall specifically the substance of any one conversation?

"A. That's right.

525 "Q. Were you in the same room when these people were discussing this matter?

"A. Yes.

"Q. You were?

"A. Yes.

"Q. And how old were you at that time?

"A. Oh, somewhere around seventeen.

"Q. Had you graduated from high school?

"A. When I went to school we didn't graduate from high school.

"Q. Isn't it a fact that when you were interviewed by Mr. Solomon in March of 1953 you indicated that you did overhear conversations, but that you were usually sent into another room when your father was talking with Mr. Costello?

"A. Yes, they would start, and then he would say, 'Why don't you go in the other room?' or something like that.

"Q. And you would go in the other room and listen to what was being said then?

"A. Well, probably.

"Q. Did you know Ed Costello?

"A. That was the party that we went to visit in Astoria.

526 "Q. Is that the only time you ever met him?

"A. Yes, to my recollection.

"Q. I understood that the only time you ever heard any conversations between Mr. Costello and your father was during the period you were living in Commack, is that right?

"A. That's right.

"Q. Then you also indicated that you recalled Frank Costello being there only on one or two occasions?

"A. That's right.

"Q. So you really didn't hear very many conversations?

"A. No.

"Q. Perhaps one or two?

"A. Yes.

"Q. Or one?

"A. No.

"Q. One or two?

"A. Two.

"Q. Two conversations? And how long did these conversations last?

"A. Well, they could have been any length of time. I don't recall that.

527 "Q. You indicated that you did not know your father was in the real estate business?

"A. I what?

"Q. You did not know your father was engaged in any real estate business?

"A. To the best of my knowledge, he was not.

"Q. You don't know that he was not engaged in any real estate business, however?

"A. He was not.

"Q. Do you know that he was not?

"A. Yes.

"Q. How do you know that he was not?

"A. Because there was never any real estate transactions or anything like that ever mentioned. And certainly it would have been mentioned.

"Q. Well, how often were you in the office at the Long Beach building?

"A. Well, I would say three or four times."

528 "Q. So you don't really know what went on in the office there, and you cannot say on the basis of your three or four appearances that real estate transactions were not being conducted?

"A. From the appearance of the office I would say definitely there were no real estate transactions being held.

"Q. What do you mean by that?

"A. Well, ordinarily they don't sit around with their feet on the desk reading the newspaper, and that sort of thing. And talking over race horses and bootlegging

and that sort of thing. I mean, they just don't do that, that's all.

"Q. I thought you indicated you didn't hear any conversations in the Long Beach building relative to bootlegging?

"A. Well, as young as I was I still knew what 529 a racing form looked like, and that sort of thing which they had around there.

"Q. Didn't you testify a moment ago you didn't hear any conversations at the office?

"A. About bootlegging. Naturally, they would be talking about something.

"Q. You don't know they were doing bootlegging from that office—that is all I am saying?

"A. I would say yes, definitely.

"Q. How do you know that?

"A. It is just understood that he had to have a place of business.

"Q. How do you know this was not a real estate office, is all I am asking you?

"A. Because there were never any real estate transactions going on.

"Q. Were you ever there where you would have an opportunity to observe these real estate transactions?

"A. No, but it certainly seems to me you would realize, or you would hear some conversation about it.

"Q. And you were over there three or four times, and the three or four times you were there you didn't hear real estate discussed, and you didn't hear any bootlegging discussed, isn't that correct?

530 "A. That's right.

"Q. You didn't hear any conversation?

"A. They talked about something.

"Q. But you don't recall what it was?

"A. No.

"Q. You had no basis to say that they were not involved in real estate in that office?

"A. That's right, I have no basis except just common sense.

"Q. You can surmise and conclude as you wish, but that is not what we are looking for.

"A. All right.

"Q. And likewise, you have no basis to say that they were engaged in bootlegging in that office?

"A. That's right.

"Q. Because you don't really know what kind of business they were conducting in that office?

"A. That's right.

"Q. And likewise, you do not know whether or not Frank Costello was engaged in the real estate business, do you?

"A. That's right.

"Q. Do you recall receiving that telegram?

"A. It was sent to my mother. I didn't receive it.

531 "Q. When is the first time you saw it?

"A. When is the first time?

"Q. When is the first time you saw the telegram?

"A. Right after my father's death. It was sent to Detroit.

"Q. Sent to your mother?

"A. Yes.

"Q. And you saw it when she received it?

"A. Yes.

"Q. And where was it after she received it?

"A. Where was it?

"Q. Who had it?

"A. My mother.

"Q. In her possession?

"A. Yes.

"Q. Do you know that?

"A. Yes.

"Q. How do you know that?

"A. She went and got it for Mr. Solomon.

"Q. Do you live with your mother?

"A. No. She lives with me nine months of the year.

"Q. Where does she live the other three months?

"A. Cleveland, New York.

532 "Q. Was this telegram in your home when she found it for Mr. Solomon?

"A. No.

"Q. Where was it when she found it for Mr. Solomon?

"A. Actually, I don't know where she got it. She might have gotten it down at her house.

"Q. So you don't know where the telegram was kept from the time it was received until the time Mr. Solomon got it?

"A. It was in her possession.

"Q. But you don't know where it was?

"A. She had it. It was in her possession.

"Q. I understood she lived with you for nine months and lived in Cleveland, New York, for three months of the year.

"A. That's right.

"Q. And it wasn't in your home?

"A. Most likely it was down at her house.

533 "Q. What years were you in the office in the Long Beach building—what year were you going into the office there, or what years?

"A. That was in 1925. The end of 1924 and 1925.

"Q. '24 and '25?

"A. Yes.

"Q. Where were you living at the time you went there?

"A. Commack.

"Q. Commack, Long Island?

"A. Yes.

"Q. And during that period of 1924 and 1925 you went there three or four times?

"A. That's right."

538 Mr. Robson: This is a deposition of one John McLeod also taken on December 4, 1958 at Los Angeles pursuant to notice, and I would like to offer it as Government's Exhibit 35.

I would like to read a few excerpts from it.

Mr. Robson: Page 3:

"Q. Mr. McLeod, were you at one time a member of the United States Coast Guard?

539 "A. Yes, sir.

"Q. Approximately when was that?

"A. Prior to 1925.

"Q. Do you recall when you joined the Coast Guard?

"A. No, I don't. I haven't—I can't remember.

"Q. Do you remember about how long you were in the Coast Guard?

"A. Over a year, a little bit.

"Q. Would the date April, 1925 refresh your recollection?

"A. I think it would be something along there.

"Q. When you joined the—

"A. I think so.

"Q. Where were you stationed in the Coast Guard?

"A. New London, Connecticut.

"Q. Now, while you were at New London, Connecticut, did you have occasion, do you recall, to meet someone by the name of Harry Sausser?

"A. Yes.

"Q. I show you a photograph which is marked Government's Exhibit One for identification in the deposition of Philip Coffey and I ask you if you see the man that you met as Harry Sausser in that picture?

"A. That looks like him right there.

540 "Mr. Robson: May the record indicate that the witness is pointing to a man sitting in the middle of the picture on the right side above and below two women. One woman right below, a woman holding a dog, is that correct?

"A. Yes.

"Q. And right in front of him is a woman sitting with her hands crossed in front of her knees, is that right?

"A. Yes.

"Q. And that is the man known as Harry Sausser? Is that the man with the cigar in his mouth?

"A. Yes."

Will Mr. Williams concede that the witness identified the same photograph which had previously been identified as that of Harry Sausser, Government's Exhibit 4 in evidence?

Mr. Williams: Yes.

Mr. Robson: "Q. Approximately how soon after you joined the Coast Guard was it that you met Harry Sausser?

"A. Oh, I would say three or four months maybe.

"Q. Three or four months. And this was in New London?

541 "A. Yes.

"Q. Was anybody with Harry Sausser when you met him?

"A. Yes, I think it was several others with him.

"Q. Do you remember who any of them were?

"A. I can't remember now; I think some of them were in the Coast Guard.

"Q. You hadn't met Harry Sausser before this, had you?

"A. No.

"Q. Do you recall who introduced you to him?

"A. No, I don't.

"Q. Now, did you have"—

Mr. Williams: Now, your Honor, beginning here I object to the testimony in the next two and a half pages, because it is all hearsay, recounting what Harry Sausser told the witness McLeod. Maybe you should read it. I would like to make that objection now so that your Honor will have that in mind when you hear this question.

The Court: What is the question?

Mr. Robson: "Q. Now, did you have any occasion to have any conversation with Harry Sausser either at that meeting or subsequently?

542 "A. I think at that time Harry Sausser lost a boat. I think that was the reason he was in New London.

"Q. Is this what he told you?

"A. Well, he was telling us all. We were in a local restaurant or saloon.

"Q. What do you mean by lost a boat? Can you explain that?

"A. He had a load of rum on it, got caught coming down, got caught close by there some place.

"Q. You mean a boat of his had been picked up by the Coast Guard for running rum?

"A. Yes.

"Q. Did you have any other conversations with Sausser? Do you recall anything else he said?

"A. No, I think it was the start of a big party that night, I can remember."

Then further down the page:

"Q. Do you recall Sausser saying anything about having any liquor aboard the Vincent A. White?

543 "A. No, the only thing I heard Sausser saying about he got all the way down to off some—between some island or something, he was all clear and when he got caught I think it was a shore station man that caught him. He was in that close to shore anyhow, I think it was a shore man who picked him up."

That is the only portion of the deposition I would like to introduce.

559

New York, January 6, 1959
10:30 o'clock a.m.

560 (Deposition of Philip Coffey):

Mr. Robson: (Reading):

"Q. Mr. Coffey, how old are you?

"A. Born in '88, will be 70 the 19th day of this month.

"Q. And where do you reside?

"A. 1805 North Wilcox, Hollywood.

"Q. Are you employed?

561 "A. No—off and on. I am employed at the Bole Inn, it is a saloon we will say, and he calls me up once in a while, 'will you come and work for me for two or three hours,' and that is it. I don't get in over—well, if I have a good week I might probably \$30.00 or \$31.00, that's about the extent.

"Q. Outside of your income from these occasional periods of service as a bartender, do you have any other income?

"A. Social Security.

"Q. You receive Social Security?

"A. Oh, yes, 94, 90 a month.

"Q. Now, were you ever employed by the Government, Mr. Coffey?

"A. Yes.

"Q. And when was that?

562 "A. Well, I would have to say around 1920 or '21—'20 or '21, around that years.

"Q. And what was your position with the Government?

"A. As Inspector, Prohibition Inspector.

"Q. With the Treasury Department?

"A. That was the Treasury Department.

"Q. For how long did you serve as a Prohibition Inspector?

"A. Oh, less than a year, couldn't tell exactly but less than a year.

"Q. Did you leave that position voluntarily?

"A. No, I was—Mr. O'Connor, who was the Director at the time, called another fellow and myself into the office and told us to resign.

"Q. Have you ever been arrested or convicted of any crime?

"A. No, outside of—well, bookmaking here.

"Q. You were arrested in the 1920's, do you recall, in connection with bootlegging?

"A. 1920?

"Q. 1925.

A. Well, yes, I was arrested then, everybody, Bill O'Dwyer, and I don't know how many more.

563 "Q. Did you go to trial?

"A. Yes.

"Q. What was the result of that trial?

"A. The result was disagreement.

"Q. Were you ever retried?

"A. No.

"Q. And you say you were in addition arrested for bookmaking on several occasions?

"A. I was arrested three times, bookmaking, no convictions.

"Q. Do you recall when that was?

"A. Sir?

"Q. Do you recall when that was?

"A. Well, let's see. Say maybe four or five years ago. Yes, it has to be that long or more.

"Q. You left the Government service in about 1921 or 1922, is that correct?

"A. Yes.

"Q. What did you do when you left the Government?

"A. I sold whisky.

"Q. Were you ever employed by someone by the name of Manny Kessler?

"A. Yes.

"Q. Was that right after you left the Government?

564 "A. Yes.

"Q. What was the nature of your job with Manny Kessler?

"A. Well, the nature was on withdrawals, withdrawals from Government warehouses.

"Q. Withdrawals of what?

"A. Wines and whiskies and—

"Q. Exactly what did you do? Would you describe your work.

"A. Well, Mr. Kessler would give me—his office—or Mr. Kessler would give me withdrawal certificates to go to whatever warehouse and withdraw whatever amount of whisky or wines that was on the withdrawal list. Maybe 100 cases, 50 cases, 200 cases, whatever it was.

"Q. What did you do when you got these withdrawal certificates?

"A. Went to the warehouse.

"Q. Did you go alone?

"A. No, the truck went to the warehouse and I went back to the office. I just—my job was just seeing that the withdrawals were placed on the truck and the truck went away and I went in the car with another fellow.

565 "Q. So far as you know this liquor which was withdrawn was withdrawn legally pursuant to a certificate, is that right?

"A. That's what they—of course, the Government warehousemen wouldn't give it to you unless it was legitimate.

"Q. Do you have any knowledge of the use which was made of the liquor after it was withdrawn?

"A. I didn't care; no.

"Q. You have no idea where it was sold?

"A. Well, naturally I have an idea.

"Q. Of your own knowledge now?

"A. Well, I imagine it wound up in saloons.

"Q. I don't want to know what you imagine. Do you know where it wound up?

"A. No, I don't.

"Q. Did you have occasion to deliver the liquor or make arrangements for its delivery?

"A. No.

"Q. The last you saw of it was when it was placed on the trucks?

"A. On the trucks.

"Q. Did you have any connection with any whisky while you worked for Manny Kessler which did not come
566 from a Government warehouse?

"A. No.

"Q. Did you have any knowledge of any whisky which did not come from a Government warehouse?

"A. No.

"Q. Did you see any whisky while you worked for Manny Kessler which did not come from a Government warehouse?

"A. No.

"Q. Do you know whether or not Manny Kessler was engaged in dealing in liquor which was imported from outside the country?

"A. Repeat that question.

"Q. Do you have any knowledge of whether or not Manny Kessler was engaged in importing liquor from outside of the country?

"A. No.

"Q. You have no knowledge?

"A. No.

"Q. Incidentally, this period during which you worked for Manny Kessler was a period when the National Prohibition Act was in existence, is that right?

"A. Yes.

"Q. How long did you work for Manny Kessler?"

567 "A. Oh, I would say maybe a year.

"Q. When you worked for Manny Kessler, did you ever have occasion to meet Frank Costello?

"A. Well, not in a business way; I met him socially.

"Q. Did you have any conversations with him?

"A. Regarding liquor?

"Q. Well, did you ever have any conversations with him at all about anything?

"A. Well, as I say, socially I have met him in restaurants and around New York.

"Q. Did you ever have any conversations with him concerning liquor?

"A. No.

"Q. This is while you are working for Manny Kessler now?

"A. No.

"Q. What did you do after you stopped working for Manny Kessler?

"A. Well, I sold whiskey.

"Q. Who did you sell whiskey to?

"A. Different saloons around New York.

"Q. Where did you get the whisky?

"A. Well, Eddie Costello.

567a "Q. Is Eddie Costello related to Frank Costello?

"A. I believe as far as I know he is a brother.

"Q. Where did you speak to Eddie Costello about buying whisky?

"A. Well, in his office there in Lexington Avenue.

568 "Q. Do you recall where on Lexington Avenue it was?

"A. Well, it was I would say around 43rd, 44th Street, around in there.

"Q. Could it have been 42nd Street?

"A. I think it was up above 42nd Street on Lexington. Maybe it was in the middle block between 42nd, 43rd, I don't remember now.

"Q. Do you remember the address?

"A. No.

"Q. Does 405 Lexington Avenue refresh your recollection?

"A. Yes, I guess that would be it. Is that above 42nd Street?

"Q. Well, do you recall whether this building was on the site which is now occupied by the Chrysler Building?

"A. It was on the east side, yes.

"Q. On the site which is now occupied by the Chrysler Building?

"A. I guess so, yes.

"Q. How often did you go up to this office to purchase liquor?

"A. Whenever I had occasion to give orders where to deliver and probably once a week or maybe not that often.

"Q. I show you Government's Exhibit one for identification and ask you if you can identify the persons whom you know as Frank Costello and Eddie Costello on this photograph?

"A. This I would say is Frank.

"Q. Which one is that? Could you describe his appearance in the picture?

"A. This picture here. This is Frank Costello here.

"Q. Is that the man in the extreme upper right-hand corner holding some sort of a pole?

"A. Yes, yes; Eddie, that's the only one I know in this picture.

"Q. You don't see Eddie Costello in that picture?

"A. No, I don't.

570 "Q. I show you Government's Exhibit Two for identification and ask you if you can identify that person?

"A. Looks to me like Eddie Costello; I would say it is."

571 "Q. Could you describe the office at 405 Lexington Avenue or the office to which you went?

"A. Well, it was upstairs, I believe, on the first floor—the second floor I mean. As I recall on the second floor and not too big an office. I don't know whether it was one full room or whether it was more than one room.

"Q. When you walked in was there any sort of a railing separating—

"A. Not that I recall.

"Q. How large a room would you say it was?

"A. Well, I would say a room almost as large as this, maybe not quite as large.

"Q. What are the dimensions of this room, about 25 by 20? Well, can you estimate in feet approximately?

"A. Well, I would say the room was from that door over to that wall there and just about the same depth. That's what I would say, what the footage is, I don't know.

572 "Mr. Robson: Well, can we have some agreement on what the size of this room is? I say about 20 by 25, maybe it is a little larger.

"Mr. Fuller: We will say it is 25 by 25, it looks almost square.

"Mr. Robson: Stipulated that the room described is about 25 by 25.

"Q. What was in the room?

"A. Well, there was a desk there, I know that.

"Q. How many desks?

"A. One is all I recall.

"Q. One is all you recall?

"A. (Witness nods affirmatively.)

"Q. And who do you recall seeing in that room when you went up there?

"A. Well, I saw Eddie and I saw another fellow there, big tall fellow; they said his name was Ellis. Ellis, I believe they called him.

"Q. Do you recall seeing anybody else up there?

"A. No. Well, I saw Frank up there.

"Q. You saw Frank Costello?

"A. Frank was up there some time when I was up there.

"Q. Who was sitting at the desk when you went up there?

573 "A. Well, I think as I recall Mr. Ellis."

Mr. Robson: There was an objection by Mr. Fuller: "Can we have a period on this now, what time we are talking about?

"Mr. Robson: This is subsequent to your employment with Manny Kessler for about—

"A. This is after.

"Q. After you were employed by Manny Kessler. When did you stop working for him?

"A. Well, as I say I worked about a year I worked for him. I don't know just what year it was. It was right after I got out of the Government.

"Q. Would this have been—

"A. Around 1922 I would think, somewhere around there.

"Q. This was 1922 or 1923 that you were up there?

"A. Yes.

"Q. And this was for a period of how long that you went to this office?

"A. Not too long. I wouldn't say—I would say less than a year.

"Q. For a period less than a year you went up to this office?

574 "A. I would say that. It is so long ago.

"Q. I realize that. Just asking for the best recollection.

"A. Yes.

"Q. Where was Frank Costello in the room when you were up there?

"A. Well, I think I only saw Frank up there once or twice. I think he sat behind the desk. I think, I won't swear to it.

"Q. And where was—

"A. He was in the room maybe once or twice when I

was up there, but all my business was with Eddie Costello.

575 "Q. Was Frank Costello there while you were making arrangements with Eddie Costello?

"A. He was there, I guess, yes.

"Q. Was he close enough to hear a conversation in your opinion?

"A. I think he probably was, I wouldn't know."

• • • • •
"Q. I will ask him again. Do you recall whether Frank Costello was present at any of the times when you were talking to Eddie Costello about purchasing liquor?

"A. Well, yes. I believe he was present, yes. I know he was present but he didn't concern himself about asking me any questions about whisky.

"Q. Do you recall how far approximately he was standing or sitting from where you were talking to Eddie Costello?

576 "A. Oh, I don't know, maybe 15 feet—10, 15 feet, something like that.

"Q. Were you talking to Eddie Costello in an ordinary conversational tone of voice?

"A. Yes.

"Q. In your opinion were you talking loud enough for Frank Costello to have heard what you were saying?

"A. Well, probably if he was paying any attention he could probably hear me, yes.

"Q. Do you recall being examined and giving a statement in May of 1953 over at the office of the Immigration and Naturalization Service in New York?

"A. In New York?

"Q. I am sorry, in California.

"A. I was with Mr. Solomon.

"Q. Mr. Solomon asked you some questions, is that right?

"A. That's right.

"Q. And you recall that there was a stenographer present at that time?

"A. I believe there was.

"Q. And do you recall being given a copy of the statement which was transcribed and having been asked to sign it?

"A. Yes.

577 "Q. And do you recall having initialed each of the pages of the statement?

"A. Yes.

"Q. Did you read the statement after you gave it?

"A. Yes.

"Q. Was it accurate at the time you gave it?

"A. Well, as far as my knowledge, yes."

At this point the statement was marked for identification as Government's Exhibit 3.

"Q. I show you Government's Exhibit 3 for identification and I ask you if this is your signature on page 15?

"A. Yes.

"Q. I ask you to look at the margins of the other pages and ask you if those are your initials in the margins of each one of these pages. Are those your initials in the margins?

"A. Yes.

578 "Q. Mr. Coffey, subsequent to the time you made this statement, that is, after you made this statement in 1953, did you have occasion to talk about this case with anybody other than people representing the United States Government?

"A. Well, yes, I talked about the case with friends of mine.

"Q. Which friends did you talk about the case?

"A. Well, Bill Frawley; for one, and—well, probably several.

"Q. Did you talk to anybody from the office of the attorneys representing Mr. Costello?

"A. No.

"Q. You didn't?

"A. (Witness nods head negatively.)

"Q. Did you have any occasion to talk about this case with a man named Jim O'Connell?

"A. Yes.

579 "Q. When was that?

"A. Well, let's see. When was the case?

"Q. The trial was in 1956.

"A. '56.

"Q. September.

"A. It was in September as I recall, is that right?

"Q. Yes.

"A. Well, I would say around the first part of September or the middle of September.

"Q. This was just about the time when you had been contacted by somebody in the Government with regard to coming to New York to testify, is that right?

"A. I don't quite understand that.

.

"Q. Who was Jim O'Connell?

"A. Well, Jim O'Connell I knew in New York for several years and I knew he was a bootlegger same as I was.

"Q. Was he ever associated with Frank Costello to your knowledge?

580 "A. Not that I know.

"Q. Wasn't Jim O'Connell Frank Costello's bodyguard at one time?

"Mr. Fuller: I object to the question as misleading.

"Mr. Robson: Then I withdraw it.

"Q. You say to your knowledge Jim O'Connell was never in any way associated with Frank Costello?

"A. To my knowledge no.

"Q. What did you say to Jim O'Connell about the case?

"A. Well, he was out here and he took me to dinner one night and met some other people. I have forgotten

who they were, a couple of girls, up at Romanoff's Restaurant and I said, 'What are you doing out here, Jim?'

• • • • •
 "Q. Just tell us what you said to him."

"A. I don't know what the ~~hell~~, I did say."

581 "Q. But you had a conversation with him about the case?

"A. We talked about the case, yes."

"Q. And this was in the beginning of September 1956?

"A. Yes, the early part of September or middle of September."

"Q. Do you recall being asked in the statement that you made in 1953 these questions and having given these answers?"—

• • • • •
 Mr. Robson: (Reading)

585 "Mr. Fuller: I object. Are you trying to impeach him now? He has previously testified that he did not buy liquor and now you are impeaching your own witness."

"Mr. Robson: Yes."

"Mr. Fuller: There is no necessity for objection, I believe."

"Mr. Robson: You can make an objection in the record. I think that is a proper objection as to form right now."

"A. Well, I don't—I don't want to perjure myself but it is so vague to me that I might have and I might not have, but I say I don't want to perjure myself and will not for anybody."

"Q. Well, you did say in 1953 that you did purchase liquor from Frank Costello?"

"A. Well, according to what you are reading there, yes."

Mr. Williams: I think that is objectionable. I rise at this point, because it is adverting to the statement rather than his testimony at the moment under oath. In

586 other words, this answer is, well that is what is in the statement you handed me.

The Court: Well—

Mr. Williams: The next question, your Honor, I think straightens it out because he says, "What is your present testimony?"

The Court: Yes. All right. Well, then, I will sustain your objection to that.

Go on to the next.

Mr. Robson: (Reading)

"Q. What is your present testimony? Did you or did you not purchase liquor from Frank Costello?"

"A. Oh, it is so hard—I won't say yes and I won't say no; I might have and I might not have, I don't recall. That's my—

"Q. You don't recall whether you ever discussed liquor with Frank Costello?"

"A. I have discussed liquor with Frank Costello, yes.

"Q. In connection with your own purchases of liquor?"

"A. Well, yes, I will say that.

"Q. You spoke to Frank Costello about buying liquor?"

"A. Yes.

587 "Q. You told him you wanted to buy liquor?"

"A. Well—

"Mr. Fuller: I object to the questions. You are leading the witness again.

"Mr. Robson:"—

The Court: Overruled. What is the answer?

Mr. Robson: (Reading)

"Q. What did you tell Frank Costello about purchasing liquor?"

"A. I didn't tell him anything as I recall.

"Q. What were your conversations about?"

"A. Well, I did all my business with Eddie Costello.

• • • • •

"Q. What were your conversations with Frank Costello about liquor at this time?

"A. Well, I would say price, how much so-and-so was, so-and-so not.

387a "Q. You asked Frank Costello about what, the price?

"A. Eddie Costello and Frank, yes.

388 "Q. You did speak to Frank Costello about the price of liquor?

"A. Well, I would say Eddie Costello did all my business. I did business with Eddie Costello all of the—

"Q. I am trying to find out now about the conversations you had with Frank Costello about liquor, not Eddie Costello.

"A. Well, I don't remember.

"Q. You did have conversations with him about liquor, you say?

"A. Yes, yes."

• • • • •
390 "Q. Can you explain how come you remembered in 1953 that you had purchased liquor from him and you can't recall it now?

"A. No.

"Q. And you can't recall what your conversations with Frank Costello were in connection with liquor?

"A. No. We talked casually about price of so-and-so and so-and-so, and I could get it maybe a few dollars cheaper from somebody else and—

"Q. What does so-and-so refer to, brands of liquor?

"A. Brands of liquor.

"Q. Now, other than the purchase of liquor at 405 Lexington Avenue and these conversations that you just talked about, did you ever have any other occasion to—or did you ever deal with Frank Costello in any other way in regard to liquor?

"A. Uh-huh.

391 "Mr. Fuller: I didn't get the answer.

"A. No.

"Mr. Robson: Q, Do you recall a boat by the name of the Vincent A. White?

"A. Yes.

"Q. Do you recall having done anything in connection with unloading liquor from that boat?

"A. Yes.

"Q. What did you do?

"A. Well, I supervised—I went out with the order and I have forgotten now whether it was Bill's or whether it was an order that Frank Kelly gave me.

592 "I went out to the boat and gave the order to the super-cargo man and the boats were there that I hired from Montauk Point and they loaded the boats and brought it to shore.

"Q. Now, who requested you to go out to the Vincent A. White?

"A. Frank Kelly.

"Q. When was this?

"A. Well, this—it must have been about 1924 or 5—I imagine '25. When were we all arrested? '25, wasn't it?

"Mr. Fuller: December '25.

"Mr. Robson: December, 1925.

"A. That's when it was, just before that.

"Q. And you say you were requested to go out there by Frank Kelly?

"A. Frank Kelly.

"Q. Was anybody with Frank Kelly at the time?

"A. Sir.

"Q. Was anybody with Frank Kelly at the time he made this request?

"A. No, not that I recall; no.

"Q. Frank Costello was not with him when he came out to see you?

593 "A. Frank Costello was out in the car; he sat out in the car.

"Q. Did you have occasion to speak to Frank Costello at that time?

"A. I said hello to him, yes.

"Q. You said hello to him?

"A. Yes.

"Q. You had already met Frank Costello previously, hadn't you?

"A. Oh, sure.

"Q. You knew who he was?

"A. Yes.

"Q. He sat in the car?

"A. Yes.

"Q. Where was the car parked?

"A. The car was parked outside the restaurant where I live.

"Q. Where was that?

"A. Montague Point."

And that should be, of course, Montauk Point.

The Court: Yes.

Mr. Robson: (Continuing reading):

"Q. What was the name of the restaurant?

"A. Schaeffer's, I believe.

594 "Q. Who was driving the car, do you recall?

"A. Frank Costello.

"Q. Frank Costello was driving?

"A. Yes.

"Q. Frank Kelly got out of the car?

"A. Yes.

"Q. Were you outside when the car drove up?

"A. No, I was inside.

"Q. Were you called to come outside?

"A. Yes.

"Q. Who called you?

"A. Well, say Frank Kelly, I believe, came in the restaurant, asked if Phil Coffey was around and somebody there—Schaeffer, I presume—said, 'He is in his room.'

"Q. Yes?

"A. So that's how I met Frank Costello or Frank Kelly.

"Q. Frank Kelly was then in the restaurant?

“A. Yes.

“Q. What did you do, walk back outside with him and meet Frank Costello?

“A. After we finished our business, yes.

“Q. After you finished your business. This was
595 not before?

“A. Yes.

“Q. Did you ever take any whiskey off the Aryca for anybody?

“A. I don't recall—Aryca—I don't remember that name.

“Q. Do you recall this conversation with Frank Costello which appears on the answer to these questions. Frank Costello you said said to you, ‘I have some whiskey outside, do you think you could bring it in for me?’ Do
596 you recall him saying that to you?”

Mr. Robson: (Continuing reading): Not—my conversation was with Frank Costello, that was with Frank Kelly.

“Q. Do you recall a conversation with Frank Costello in which he made that statement to you?

“A. No.

597 “Q. But now you deny that you had any conversation with Frank Costello?

“A. I don't deny anything. I said I probably did and probably did not; I am not denying.

598 “Q. You couldn't have probably did and probably did not. Either you did or you did not.

“A. Well, I don't remember.

“Q. Did you discuss this question with Jim O'Connell?

“A. What question?

“Q. The answer which you gave to this question when you said that Frank Costello said to you, ‘I have some

whiskey outside, do you think you can bring it in for me?' Did you discuss that with Jim O'Connell?

"A. With Jim O'Connell, no, no.

"Q. Were you ever paid for bringing in this liquor from the Vincent A. White?

"A. Yes.

599 "Q. By whom?

"A. Well, as I said before I think it was the big tall fellow by the name of Ellis.

"Q. Where were you paid?

"A. In the 405 Lexington Avenue.

"Q. Who told you to go to 405 Lexington Avenue for payment?

"A. Frank Kelly.

"Q. What did he say when he told you to go to 405 Lexington Avenue?

"A. 'Go get your money.'

"Q. Did he say who would pay you?

"A. No.

"Q. Did he say Frank Costello?

"Mr. Fuller: I object, that is a leading question."

The Court: Overruled.

Mr. Robson: (Continuing reading)

"Q. Didn't he tell you that Frank Costello would take care of paying you for the whiskey?

"A. No.

"Q. He didn't?

"A. He said go to the office and get your money.

"Q. Go to whose office?

"A. Costello's office.

600 "Q. He told you to go to Costello's office?

"A. Yes.

"Q. Frank Costello's office?

"A. Yes. Well, Eddie Costello, Frank Costello.

"Q. Did he tell you Eddie Costello or Frank Costello?

"A. Frank Costello.

"Q. He told you to go to Frank Costello's office and you would get paid?

"A. Yes, the bookkeeper would pay you, that was Ellis, I believe.

"Q. At Frank Costello's office?

"A. Yes.

"Q. You knew that Frank Kelly and Frank Costello were in this deal together, didn't you?

"A. Well, yes; I probably did.

"Q. How did you know they were in it together?"

604 "A. Well, on account of Frank Costello being with Kelly that day coming down to Montague Point."

Mr. Robson: "Q. As a matter of fact, Frank Costello was the man who asked you to bring in the liquor, didn't he?"

Mr. Robson: "A. No.

611 Mr. Robson: "Q. Were you present when the liquor was landed on the dock?

"A. What?

"Q. Were you present when this liquor was landed on the dock?

"A. Yes.

"Q. What happened to it when it was landed on the dock?

"A. What?

"Q. What happened to it?

"A. Well, it was put on trucks and sent to New York.

612 "Q. Who put it on the trucks?

"A. My men that worked for me.

"Q. Your men put it on the trucks?

"A. Yes.

"Q. What trucks did they put it on?

"A. I don't know the names of the trucks.

"Q. How did you know what trucks to put it on?

"A. Well, I believe they came down with an order.

"Q. An order from whom?

"A. From Frank Kelly.

"Q. Do you know any of the people who were present at the time those trucks were loaded?

"A. Well, people down at Montague Point there, that's—I don't know their names. If I see them I would probably recognize who they were but they loaded the trucks for them.

"Q. Wasn't one of them named Harry Sausser?

"A. No. . . . I don't know Harry Sausser.

"Q. Were you ever out at a place known as One Hundred Eighteen or One Hundred Fifteen Halsey Street, Astoria?

"A. Yes, I believe—if that's the address, that's Eddie Costello had stored liquor, was at the address where Eddie Costello—

613 "Q. Was this a house where Eddie Costello lived?

"A. Well, I don't know the number of the house but I was out there, Eddie Costello, where he stored liquor.

"Q. Out at Astoria on Halsey Street?

"A. Well, I guess Halsey Street.

"Q. And where was the liquor stored?

"A. In a garage there.

"Q. In a garage. Is that in front, the side or in back of the house?

"A. Rear.

"Q. The rear of the house?

"A. Yes.

"Q. Who told you to go out there? Who told you that liquor was stored out there?

"A. Well, Eddie Costello.

"Q. You are sure it wasn't Frank Costello?

"A. It was not Frank Costello.

614 Mr. Robson: "Q. That is true that you did work for Frank Costello and that you landed some whiskey for him?

"A. Well, my opinion was indirectly. Frank Kelly did all the business. Now Frank Costello was connected with Frank Kelly, that's probably true, yes.

"Q. You didn't mention Frank Kelly in these answers, did you?

"A. I believe I did.

"Q. I just read you the answers. Did you hear Frank Kelly's name mentioned?

"A. No, I did not.

"Q. You said that you landed the whiskey for Frank Costello, that you worked for Frank Costello, he paid you off. You didn't mention Frank Kelly."

Mr. Robson: "A. He didn't pay me off, Mr. Ellis paid me off.

"Q. Mr. Ellis actually gave you the cash but Mr. Costello made the arrangements, didn't he?

Mr. Robson: "A. I don't know that. Do I know that? How do I know that?

"Q. He made the arrangements with you, didn't he?

"A. Costello? Frank Kelly made the arrangements with me to go to Frank Costello's office and get paid.

"Q. And Frank Kelly was the one that you worked for in unloading the liquor?

"A. Frank Kelly was the one who gave me the order to go out and get it and unload it.

Mr. Robson: "Q. You did do some work for Frank Costello?

"A. You are pressuring me. I told Mr. Solomon I never did any direct business with Frank Costello.

"Q. I am reading to you your answers.

"A. All right; my answer is yes, yes; all right.

"Q. You did land whiskey for Frank Costello?"

"A. Yes.

"Q. You had a conversation with him about this whiskey?

"A. My conversation was with Frank Kelly.

"Q. What did you mean when you said, 'I landed some whiskey for Frank Costello'?

"A. Well, I guess probably I thought it was Frank Costello's.

"Q. Why did you think it was Frank Costello's?

"A. Because Frank Costello came down there with Frank Kelly.

"Q. But he said nothing?

"A. He said nothing.

"Q. And the fact that he was there made you think that it was his liquor?

"A. That's right.

"Q. Even though Frank Kelly spoke to you?

"A. That's right.

619 "Q. Can you explain why you arrived at that conclusion?

"A. Oh, just natural to assume that Costello was connected with Frank Kelly.

"Q. Why was it natural to assume that?

"A. Well, because they were together. I wouldn't think Frank Costello would be down with Frank Kelly, way down at Montauk Point if he wasn't interested.

"Q. Montauk Point is quite a ways out from New York City, isn't it?

"A. 136 miles.

• • • • •
"Q. Are you sure it wasn't Frank Costello who came in and Frank Kelly sat out in the car?

"A. Frank Costello sat out in the car.

• • • • •
621 Mr. Robson: As a matter of fact, I believe I may want to read some portion of the cross-examination.

• • • • •

"Q. When you were told or when you indicated that Frank Kelly told you to go to the office to get paid; do you recall that he said to go to Frank Costello's office?

622 "Q. Or did he say just to go to 405 Lexington Avenue?

"A. Go to Costello's office.

"Q. Did he have to tell you where to go at all? Wasn't it a fact that you knew where to go in any event?

"A. Yes.

"Q. Isn't it possible that he didn't tell you to go to Costello's office but just told you to go downtown and get paid?

"A. He could have but I knew where to go."

623 "Q. On the occasion when you mentioned previously that Mr. Jim O'Connell had been out here to see you—

"A. He was not here directly to see me."

"Q. Correct. Isn't it a fact that he was out here on vacation in the West?

"A. That I don't know; vacation I don't know. He didn't tell me he was on vacation. I have known Jim for years.

624 "Q. And did you consider it strange that he should happen to be out here and call upon you when he was in the neighborhood?

"A. I considered it strange.

"Q. You did?

"A. Yes.

"Q. How many—

"A. Well, I said to him, 'What the hell are you doing out here?'

"Q. You thought it was strange that he was out here?

"A. Yes. That's what he—I mean—

"Q. But you weren't surprised that once he was out here that he should have called you?

"A. Well, he called on me and we went out to dinner.

"Q. But you weren't particularly surprised by that, were you? Other than the fact that you—"

"A. Yes, sir, I was surprised. He called on me; I was greatly surprised, yes."

On page 54. This is redirect now.

"Q. Mr. Coffey, just a few questions now. After this deal that you say Frank Kelly spoke to you about unloading the liquor and you went to 405 Lexington Avenue for payment, you said you knew where to go. How did you know that you were supposed to be paid at 405 Lexington Avenue?"

"A. Well, I didn't know.

"Q. You must have been told then that you had to go there.

"A. Frank Kelly told me.

"Q. He told you to go to Frank Costello's office, didn't he?"

"A. Yes.

"Q. Otherwise you would have had no way of knowing that that's where you were supposed to be paid?"

"A. That's right."

626 Mr. Robson: At page 57:

"Q. What is your answer now? Do you recall what you were told by Frank Kelly about getting paid?"

"A. I asked Frank Kelly where do I get my money. He said, 'Go to Costello's office on Lexington Avenue.'

"Q. Now, prior to the time that you saw Jim O'Connell in 1956, when had you last seen him?"

"A. Well, I hadn't seen Jim O'Connell in—well, let's see. I come out here in '34; I don't think I had seen Jim O'Connell in—oh, years before that.

"Q. So that when he visited you in 1956 this was pretty close to 30 years when you had last seen him, is that right?"

"A. Yes.

"Q. And he dropped in and invited you out to dinner?"

"A. Yes. I don't know who—"

Page 70:

"Q. When you walked into the office you must have said something to somebody, right? When you went up to get paid?

"A. I guess I said whose—oh, I said, Frank—I saw Frank there.

627 "Q. What did you say?

"A. Well, Frank said to me, 'Go and see Ellis, Ellis will take care of you.'

"Q. Didn't he ask you what you were doing there?

"A. No.

"Q. He seemed to know what you wanted?

"A. I imagine he did. He told me to go get paid from Ellis, didn't he, so he must have known what I was there for.

"By Mr. Fuller:

"Q. Did you tell him that Frank Kelly sent you?

"A. Yes—no, I didn't tell him; no, no. I didn't have to tell him that. He knew what I was there for.

"Q. You didn't tell him that 'Frank Kelly told me to come in here'?

"A. Well, maybe I did. I—Frank Kelly told me to go to Costello's office and to get my money and when I went to Costello's office Frank was there and said go and see Ellis, the bookkeeper."

• • • • •
The Court: Is there anything further that you wish to read from the deposition, Mr. Williams?

Mr. Williams: Yes, sir, page 46, the sentence
628 after the interrogation which Mr. Robson read into the record from that page which reads as follows:

• • • • •
"Q. You have no personal recollection that he told you to go to Frank Costello's office?

"A. It is so long ago for goodness sakes, 25 years."

Page 53, the interrogation immediately after that which Mr. Robson read from this page, which is as follows, the questions by Mr. Fuller and the answers by Coffey:

"Q. Were you pleased with the visit?

"A. Well, yes.

"Q. Did you have an enjoyable evening?

"A. Yes.

"Q. Did you have any difficulties with Mr. O'Connell?

629 "A. Oh, no.

"Q. Did you have any arguments with Mr. O'Connell?

"A. No.

"Q. Did your attitude in this case change in any way after you saw Mr. O'Connell?

"A. No, not a bit."

At page 51, if the Court please, the following interrogation by Fuller and the answers by Coffey:

"Q. Isn't it a fact also that you do not know that Frank Costello ever overheard any conversation that you ever had in that office with his brother Ed?

"A. He could have overheard and then if he wasn't paying any attention, he didn't hear.

"Q. You have no reason to believe that he ever did hear any conversation?

"A. No, no reason to believe.

"Q. Isn't it a fact, Mr. Coffey, that you do not know of your own personal knowledge that Mr. Frank Costello ever engaged in bootlegging or in the sale and
630 purchase of alcohol?

"A. Well, through hearsay I would say.

"Q. I am not talking about hearsay. Of your own personal knowledge you do not know, do you, that he was ever so engaged in the business?

"A. Well, other than Frank and Eddie they must have been brothers and they were in the same office so that's—

"Q. You don't know, you personally have no knowledge of any transaction which ever occurred which Frank Costello took part?

"A. Well, I thought that he was in the business.

"Q. But you never knew this?

"A. I never had any direct—

"Q. However, you did do business with Ed Costello?

"A. That's right."

Page 60, if the Court pleases; this is further examination by Fuller and answers by Coffey:

"Q. He didn't say to Frank Costello's office, didn't he? He said Costello's office?

"A. Costello's office.

"Q. It could have been Ed Costello's office for all you know?

"A. Could have been. He said, 'Go to Costello's 631 office and get your money.'

"Q. And your identification with that office was with Ed Costello, was it not?

"A. Yes.

"Q. All your previous transactions in that office had been with Ed Costello?

"A. That's right.

"Q. And when he said Costello's office you thought of it as being at Costello's office because whenever you went there—"

Then at this point Mr. Robson said:

"Let's not put words in his mouth. I don't mind you leading him a little bit."

Then Mr. Fuller said: "I am cross-examining him."

Mr. Robson thereupon said: "Well, let's not put words in his mouth."

The Court: Well, what was the answer.

Mr. Williams: The answer was:

"Well, I answered that I believe assuming that when Frank Costello was there and Eddie Costello, I assumed that they were partners or in deals together.

"Mr. Fuller:

"Q. Yes, but your business was always with Ed 632 Costello?

"A. My business was with Ed Costello. I think if Mr. Solomon recalls when he first came out here why I told you repeatedly that I had never had any direct business with Frank Costello.

634 Mr. Robson: Yes. I would like to renew the offer of the deposition of Albert Feldman.

639 Mr. Robson: "This is an examination before trial held on behalf of the Government—

"held on behalf of the Government by stipulation between counsel. Mr. Wasserman, may we have the
640 usual stipulations waiving filing and signing before any notary, etc.?

"A. Yes.

"Q. Thank you. Mr. Feldman, would you state your full name please?

"A. Albert E. Feldman.

"Q. Thank you. What is your age, Mr. Feldman?

"A. 76 years.

"Q. How long have you lived in New York City?

"A. 75 years.

"Q. Did that include that period from 1920 to 1930?

"A. Yes.

"Q. Now, during the period referred to as Prohibition, were you a bootlegger, and by that I mean were you engaged in the illegal sale or transportation or importation of whiskey or alcoholic beverages?

"A. Yes.

"Q. When did you start in the illicit liquor business or bootlegging?

"A. I don't remember exactly.

641 "Q. Well, approximately?

"A. Probably around 1928 or 1930.

"Q. Did you have any transactions in illegal liquor before that, sir?

"A. No.

"Q. Now, Mr. Feldman, do you recall that prohibition came in around 1920, that is it became illegal to sell or deal in liquor without certain permits at that time?

"A. What time?

"Q. Approximately around 1920?

"A. Yes.

"Q. 1919, 1920; do you remember that?

"A. Yes.

"Q. And about how long after that time did you begin any dealings in liquor or working with anyone who dealt in liquor illegally?

"A. Well, it was about that time.

"Q. About 1920?

"A. Yes.

"Q. Well, then your previous answer that it was around 1928 or 1930 is incorrect, is that right?

"A. No. That's wrong.

"Q. Approximately how many years did you have any connection with the illegal liquor business after you began it?

"A. I should say, oh, about a year or so; two years maybe. I don't remember exactly how long.

"Q. But it could be a year or two years after you started it? Now, were all your dealings in the liquor business in those days illegal, that is in violation of the law?

"A. Yes.

"Q. Do you recall the names of any persons with whom you dealt while you were in the illegal liquor business?

"A. Yes.

"Q. Would you state them, please?

"A. Mannie Kessler, Sweetwood.

"Q. What's his first name, please?

"A. Morris.

"Q. Thank you. Anyone else?

"A. Yes, Simmonette.

"Q. What was his first name?

"A. Roland.

643 "Q. Anyone else?

"A. I don't remember, who else I had dealings with, some various people that I don't remember:

"Q. Did you ever have any dealings with Frank Costello in connection with your illegal liquor business?

"A. Yes.

"Q. Did you ever have any dealings with Edward Costello in connection with your illegal liquor business?

"A. Yes.

"Q. Now, is there anyone else you recall you dealt with in that business?

"A. I wouldn't know unless my memory was refreshed.

"Q. Mr. Feldman, I show you a picture annexed to a sheet which I will have marked Government's Exhibit 8 for identification, and I ask you if you have ever seen that person before?

"A. Yes.

"Q. Your answer is yes?

"A. Yes.

"Q. Who is he?

"A. Frank Costello."

644 Mr. Robson: Will Mr. Williams concede that is a picture of Frank Costello?

Mr. Williams: It looks like it to me.

Mr. Robson: (Continuing reading):

"Q. Mr. Feldman, I show you a picture annexed to a sheet which has been marked Government's Exhibit 9 for identification, and I ask you if you have ever seen the person depicted in that picture before?

"A. Yes.

"Q. Who is he?"

"A. That's Eddie Costello."

May the record indicate that the exhibit identified as Government's Exhibit 9 in this deposition is Government's Exhibit 37 in evidence, a photograph of Edward Costello?

The Court: Very well.

Mr. Robson: (Continuing reading):

645 "Q. Now, are the two men whom you have identified in Government's Exhibits 8 and 9 persons with whom you dealt in the early 1920's in connection with your illegal liquor business?"

"A. You'll have to talk louder. I can't hear you.

"Q. I'll repeat the question: You identified in the two pictures, Government's Exhibits 8 and 9; the two men you referred to as Frank and Eddie Costello when you were enumerating persons you dealt with in the bootlegging business?"

"A. Yes.

"Q. Now, Mr. Feldman, I show you a picture annexed to a sheet which has previously been marked Government's Exhibit 3 for identification, and I ask you if you can identify any of the persons in that picture?"

"A. I recognize two people.

"Q. Who are they, sir?"

"A. Frank Costello (indicating the man at the far upper right holding a golf club)."

May we have a stipulation or concession that the individual described in this exhibit is Frank Costello as identified in Government's Exhibit 4? The same picture?

Mr. Williams: Yes.

646 Mr. Robson: And then there was some colloquy and then the question was repeated. (Continuing reading):

"Q. Now, you testified that you had some illegal liquor dealings with Frank Costello. Could you tell us what dealings you had with him in that connection, please?"

"A. This man Simmonette had turned over to me a thousand cases of Scotch whiskey and asked me to sell them for him. I had no place there to store them, and I knew the Costello boys had a warehouse and trucks. I went to see Frank Costello."

647 "Q. If I may interrupt, where did you go to see him?

"A. I believe it was at Lexington Avenue and 42nd Street where he had his office at the time.

"Q. Is that where the Chrysler Building is now?

"A. Yes.

"Q. What happened when you went to see Frank Costello there?

"A. I asked him if he could store and pick up that liquor that was out in Long Island and he agreed to pick up and store the liquor for me.

"Q. When you say he agreed, you mean that he said in substance that he would do this for you?

"A. Yes.

"Q. Can you tell us the date when this was, Mr. Feldman?

"A. No, I can't tell you the date. It's too far back for me to remember.

"Q. Well, if I may refresh your recollection, do you remember the arrest of a man named Mannie Kessler, whom you referred to previously in 1923?

648 "A. Well, yes, it was around that time, but I couldn't remember the date.

"Q. If I may fix the date of that, Mr. Kessler was indicted on or about June 29, 1923. Was it a little time before that, a long time before that, after that, or what?

"A. No, I couldn't remember the date. I don't remember.

"Q. Well, do you remember that Mr. Kessler, subsequent to his arrest went to trial and was sentenced in December of 1923? Does that help refresh your recollection as to whether this transaction with Costello was before that date?

"A. Yes, it was.

"Q. It was before December, 1923, right?

"A. Yes, I believe it was.

"Q. Now, to return to the transactions: What happened after Mr. Costello said he would store that liquor for you? By the way, what were the terms of your agreement as to selling prices and so on?

"A. The terms were that he was to pick up the liquor and store it for me for a dollar a case, the total of a thousand dollars.

649 "Q. Now, did there come a time after you had that conversation with Mr. Costello when he or men working for him picked up that liquor?

"A. Yes.

"Q. About how long after your conversation with him was that?

"A. Oh, within a week after; just a few days, it was.

"Q. Did you ever have any dealings with Mr. Costello with respect to that same 1000 cases of Scotch that you referred to after it was picked up?

"A. Well, there were no actual transactions of any kind other than that particular consignment of liquor.

"Q. Well, perhaps I didn't make my question clear, but still talking about the same 1000 cases, did you ever have any other dealings with Frank Costello concerning the same 1000 cases.

"A. Yes.

"Q. What were they, please?

"A. After the liquor was stored over in Astoria.

"Q. Where was that, sir?

"A. It was in a garage, I believe.

"Q. Do you know what street it was?

"A. If my memory is right, it was at Halsey Street.

"Q. Did you ever actually see the liquor there in that garage?

650 "A. Yes, because after Costello had picked up the liquor and stored it, I wanted to see it and he gave me the address.

"Q. Do you recall the address he gave you, sir?

"A. No, I remember the house that I went to, but I don't remember the address.

"Q. Does the number 114 Halsey Street refresh your recollection?

"A. What number?

"Q. 1-1-4 Halsey Street or 1-1-7?

"A. I don't remember the number.

"Q. You say that you went to that garage and saw the liquor there?

"A. Yes, I went there and I inquired for Eddie Costello and I was told that he lived there in the house in back of the garage.

"Q. What happened when you got there?

"A. I inquired for Eddie Costello and they pretended that they didn't know who he was and that he did not live there. They asked me to identify myself. There were two women there. When I told them who I was, there was a young man came down from upstairs that I had known, having seen him around and he knew me, and he called me by my first name.

651 "Do you recall his name, sir?

"A. No. I wouldn't know his name; and he told the women in Italian language that I was O.K.; then right after that, he took me out through the back of that house and in through a small door of a brick building, and he showed me the pile of liquor that had been piled up in the garage and told me 'That's the 1000 cases of Scotch that came in from Long Island.' "

• • • • •
 "Q. Mr. Feldman, I show you a sheet of paper with two photographs annexed to it which has been marked Government's Exhibit 10 for identification, and ask you if you can identify the buildings in those two pictures?

"A. Yes.

"Q. What are they?

"A. This is a private dwelling (indicating the picture at the left on Government's Exhibit 10 of a house); and that's where I went to. I was sent to that address, that building.

"Q. You mean where the 1000 cases were?

"A. Yes; and that's where I inquired for Eddie Costello, and after I identified myself—

652 "Q. Well, you've been over that: Would you tell us what is in the picture on the right which is marked Government's Exhibit 10 for identification?

"A. Well, they took me in through this alley in through the back of this garage (indicating the garage depicted on Government's Exhibit 10); so I entered the garage from the back door, not this front door, but a door in the back of that building. I entered into that garage and there I saw the piles of liquor that had come in on the 1000 cases."

.

653 "Q. Now after you made that trip to Halsey Street and saw the 1000 cases of liquor in the garage, did you have any other dealings with Frank Costello with respect to that 1000 cases?

"A. Yes.

654 "Q. What were they?

"A. A couple of days after the liquor was stored, Doc Garner came to me and said that Frank Costello wanted to see me at the office and I went there.

"Q. Was that office at 42nd Street and Lexington Avenue, you referred to before?

"A. Yes.

"Q. What happened then?

"A. He told me he has a customer for the 1000 cases.

"Q. Who told you that?

"A. Frank, and he wanted to know how much I wanted for them, and I told him \$40.00 a case. He said he could sell them and he would be able to pay me in a few days, as soon as they were delivered, to which I agreed; and Frank said that 'I'll be responsible for the money.'

"Q. What happened after that?

"A. Shortly after that I went to see him to get the money.

"Q. How long approximately?

"A. Well, probably three or four days, because I was responsible for the liquor although I didn't pay for it; but I was responsible and had to turn over the money, so I went to Costello to get the money and he told me
655 that he shipped the liquor to Buffalo in a freight car.

"Q. That's Buffalo, New York?

"A. Yes; and he would have the money in a couple of days, and as soon as he had the money, he would pay me. Well, I waited, probably a week, and I went to the office.

"Q. The same office on Lexington Avenue?

"A. Yes; and Doc Garner told me that he got a telegram from Frank, and Frank was in Buffalo, and he wanted me to come to Buffalo right away. He didn't know why; he showed me the telegram. So I went to Buffalo to the address that Garner gave me.

"Q. Was that right after you saw the telegram?

"A. Yes. I left immediately thinking I was to get the money in Buffalo. When I got to Buffalo, I met a couple of strange men at that address, who told me that Frank was at the freight yard and they took me over to the freight yard in a car. There I met Frank.

"Q. Frank Costello?

"A. Frank Costello; and he says: 'Al, I got some bad news. I shipped the thousand cases in that car', and he pointed to the car that was empty.

"Q. You mean the freight car?

"A. The freight car; and he said 'The car came in and the liquor was hijacked;' but he says 'You got nothing
656 to that.' He says 'We know who hijacked it and we're going to make them pay, and that's what I came here for. I'll get the money, and I'll pay you for it. Don't worry,' he says, 'I'll get the money and you will get the money from me. I wanted you to see for yourself that the car was empty when it arrived here.' That's the reason I sent for you.' There was nothing else that I could do and I left that night,

and came back to New York; and I went to Costello's office many times to get the money, and each time I was told that they didn't get paid yet.

"Q. Who told you that, sir?

"A. Frank Costello, also Eddie.

"Q. Who told you?

"A. Frank Costello, also Eddie. That they will get the money and as soon as they got the money, they will pay me for the liquor. I asked them what they sold the liquor for. They told me they sold it for \$50 a case.

"Q. Did Frank Costello tell you that or Eddie?

"A. Eddie, and that they will sure get the money. I won't lose anything; that even if they don't get the money they will pay me; they are responsible to me.

"Q. Did Frank Costello ever tell you anything
657 about paying you when you were at the office?

"A. Did he tell me that? Yes, he did. He promised me a number of times that he would pay me for the liquor which he never did.

"Q. Mr. Feldman, did Frank Costello ever indicate to you that this man, Doc Garner, whom you talked about, worked for him or was associated with him in the liquor business?

"A. Yes.

"Q. Did you ever engage in any other dealings with Frank Costello?

"A. No.

"Q. All this took place before Manny Kessler went to prison, is that right—in 1923?

"A. Yes.

"Q. Can you recall any other incident of an unusual nature involving Frank Costello?

"A. No.

"Q. Can you recall any occasion on which Frank Costello was ever seen by you in possession of a weapon?

"A. Yes.

"Q. When was that?

"A. It was one morning at the Ansonia Hotel.

658 "Q. Now, again, can you fix the time with relation to Manny Kessler's being sent to prison in December of 1923? Was it near that time, before it or after it?

"A. No, it was before he went to prison.

"Q. How long before, approximately?

"A. I wouldn't know, probably a few months or so.

"Q. Not more than a year?

"A. No.

"Q. What happened then?

"A. Well, some dispute about liquor missing, . . .

"Q. Who were the parties to that dispute?

"A. That, Costello had in his warehouse.

"Q. Did that dispute take place in your presence?

"A. Yes.

"Q. And who were the parties to the dispute?

"A. Kessler, Morris Sweetwood, Eddie Costello, Frank Costello and a group of four or five more.

"Q. Where did you say this took place?

"A. In the lobby of the Ansonia Hotel.

"Q. Would you tell us in substance what Mr. Frank Costello said and what Manny Kessler said?

"A. Kessler had accused Frank Costello of having disposed of a quantity of liquor belonging to Kessler.

"Q. You said Frank Costello accused Manny Kessler?

659 "A. No, Kessler accused Costello of having disposed of some liquor that belonged to Kessler.

"Q. Then what did Frank Costello say to that?

"A. He denied it; that he had only delivered the liquor according to the orders that he had from Kessler's office.

"Q. That's your recollection of what Frank said?

"A. Yes. And during the argument there, Kessler told him he was going to hold him responsible for the missing liquor.

"Q. Frank?

"A. Frank Costello. Yes, everything was Frank Cos-

tello. He was the business man. He did all the business. So Frank Costello got pretty excited and he pulled out a small, pearl handled gun, supposedly to shoot him.

"Q. When you say that, what do you mean; did he point it at Mr. Kessler?

"A. He pulled the gun out of his pocket and everybody of the group grabbed him and held him before he even had a chance to point at Kessler. They grabbed him with the gun and yanked him away, and of course, the whole argument then broke up. That was the last I ever heard of it.

660 "Q. In the early part of your testimony, Mr. Feldman, you said you knew that Frank and Ed Costello had trucks and warehouses, etc. for storing liquor. How did you know that?

"A. It was common knowledge amongst all the boys that were dabbling in liquor. Everybody knew it.

"Q. Did you ever see the Costello trucks?

"A. Yes, I saw them several times delivering liquor at Kessler's place of business, 28th Street and 6th Avenue.

"Q. That also was before Kessler was sent to prison in December of 1923?

"A. And his trucks also were delivering liquor and picking up liquor in the office that Kessler had at 27th Street near Seventh Avenue."

661 "Q. Were you associated in some way with Manny Kessler in the liquor business?

"A. No.

"Q. Did you deal with him in the buying and selling of liquor?

"A. I did buy various small lots of liquor from him.

662 "Q. Manny Kessler?

"A. Yes.

"I have no further question."

713 Mr. Robson: The next item would be the statement given by Frank Costello to Special Agent Sullivan which has already been introduced in evidence, and I would like to read it.

714 Mr. Robson: (Reading):

"By Mr. Sullivan:

"Q. Your name is Frank Costello?

"A. Yes.

"Q. Where do you live, Mr. Costello?

"A. 115 Central Park West.

"Q. How long have you lived at that address?

"A. It will be one year this October.

"Q. Have you a telephone at that address?

715 "A. Yes.

"Q. And what is the 'phone number?

"A. Susquehanna 7-1064.

"Q. Going back to 1932, what was your business in 1932?

"A. Well, I have been a betting commissioner at the race track.

"Q. And were you in the same business in 1933?

"A. Yes, sir.

"Q. During that period were you in the liquor business at all?

"A. No.

"Q. You had nothing to do with it?

"A. No.

"Q. Did you have anything to do with the liquor business during the Prohibition era—that is, say, from 1920 to 1933?

"A. Yes.

"Q. During what period of time?

"A. Oh, until about—I will say from 1923 or 1924 until about a year or two before Repeal.

"Q. That would put you in the liquor business along about 1932, as Repeal came through in December, 1933.

716 "A. Was it 1933?

"Q. Yes, December, 1933.

"A. Well, I haven't got the exact dates.

"Q. Where were you operating—around New York?

"A. Yes.

"Q. Do you know John Torrio?

"A. Yes, sir.

"Q. You knew him in Chicago in the old days?

"A. Yes.

"Q. During the period you were in the liquor business, did you have any transactions with Torrio?

"A. No.

"Q. You knew he was in the liquor business?

"A. I didn't know his business entirely, and I could not swear what business he was in.

"Q. Well, you were connected with him in Chicago in the old days.

"A. Just how do you put that—what do you mean by 'connected'?

"Q. Well, I notice here that you got some drafts from Cusick in the old days.

"A. Well, that is not Johnny Torrio.

"Q. Well, at that time he was part of that organization.

717 "A. I don't know anything about Cusick's organization. I did business with Cusick and I don't know anything about the drafts. I might have gotten them—they are far back.

"Q. Do you recall using the name of Frank Williams at that time?

"A. I might have, yes; I think so, for banking purposes."

719 "Q. You knew Zagarino when you were in the liquor business?

"A. Yes.

"Q. Did you ever have any dealings with Frank Zag-arino when you were both in the liquor business?

"A. I had one deal with him in Canada, just an exchange of merchandise. That was many years back.

"Q. Was it after 1930?"

"A. No, I believe it was prior to that—much prior to that.

720 "Q. It didn't involve any of the Melcher goods up in Canada, did it?

"A. No. I believe I had bought some William Penn Scotch, if I am not mistaken, and he wanted some, and I transferred some to him. It was not Scotch—it was William Penn Rye, from the Consolidated Liquor Company."

721 Mr. Robson: I would like to read now a very few questions and answers from Government's Exhibit 14, the transcript of the testimony of Frank Costello before the grand jury in 1939 in this District. First on page 1.

"Q. Mr. Costello, this is a federal grand jury sitting in the Southern District of New York. This is Mr. Young and my name is Doyle. We are assistant U.S. attorneys. We are going to ask you questions; but we want you to know that any answers you may give we will use against you, if necessary. This body may find an indictment on the answers that you give in this room. The only answers that you cannot,—I mean, that you are allowed to refuse to answer is where you feel that that answer will incriminate you in a federal matter. Is that understandable?

"A. Yes, sir.

"Q. Now, do you have any name other than Frank Costello?

"A. Well, I have had Savario, which is my mother's maiden name; which is years back; twenty years, twenty-five years back.

722 "Q. What is your true name?

"A. Costello."

Mr. Robson: Then on page 19 of the second session:

"Q. The only business you ever had in New York was this Midtown Company?

"A. That's right.

"Q. You never had any interest in any bootlegging?

"A. I did a little bootlegging.

"Q. What company did the bootlegging?

"A. That is all way back.

"Q. How far back?

"A. The last time was around 1926.

"Q. No bootlegging since that time?

"A. No.

"Q. What company operated the bootlegging?

"A. No company.

"Q. Just an individual enterprise?

"A. That's right.

"Q. How long were you in bootlegging?

"A. Do you think I should answer that question, going all the way back to 1926?"

Mr. Robson: That is all from this exhibit.

723 At this point, your Honor, I would like to offer in evidence Government's Exhibit 3 for identification, being a transcript of the testimony of Frank Costello before the grand jury of New York County in September of 1943, identified by District Attorney Frank Hogan.

Mr. Williams: I object to this, if the Court please, on the ground that this testimony is clearly tainted by wire-tapping . . .

748 The Court: . . .

Now, I think what we had better do is to have Mr. Robson read the particular part he wants, and after he has finished reading a particular portion, then you make your objection and I will rule upon it.

Mr. Williams: My objection would be, your Honor, that I would object to it all.

The Court: You object to it all?

Mr. Williams: Yes, sir.

The Court: All right.

749 Now, Mr. Robson, I am not going to take it all as such; I am going to take just particular parts of the evidence.

Mr. Robson: I understand, your Honor.

Mr. Williams: I also will object specifically to these particular portions as he reads them if your Honor wishes.

The Court: All right. I think that would be the better way.

Mr. Robson: Reading now from page 577:

"Q. Did O'Connell work for you at any time?

"A. No.

"Q. Did he work for you in the 20's?

"A. Yes.

"Q. In the liquor business?

"A. In the 20's, yes."

Mr. Williams: Have you finished with that particular part?

Mr. Robson: Yes.

Mr. Williams: I object to that, your Honor. And in addition to my general overall objection I object specifically to it because just a few lines ahead of this interrogation on

750 O'Connell, there is a reference to the tap between the defendant and O'Connell, a conversation between the defendant and O'Connell, made by Mr. Hogan as he got into the subject of O'Connell, clearly indicating a tapped conversation between this defendant and O'Connell, and it shows why he is asking the questions.

The Court: Let me look at that.

Mr. Robson: Yes, sir.

Mr. Williams: Well, I will read it to your Honor. I assume on Mr. Robson's copy it is about at page 576, but if I may just read this conversation.

The Court: Yes.

Mr. Williams: Or the question preceding the reference to the tap is as follows:

"Q. Let me read you this conversation with Jim O'Connell and perhaps you can explain it to us:

"Costello: Hello, Jim.

"O'Connell: It is so darn hot, I won't be over.

"Costello: That is all right.

"O'Connell: I got the money for you.

"Costello: How much?

"O'Connell: \$2910. I will see you in the morning
751 at the barbershop. If I receive a call from Jerry
and have to leave early, I will leave it at the shop
for you."

That is a tapped conversation, your Honor.

The Court: What goes on after that?

Mr. Williams: Then there are some questions by Mr. Hogan and I will read them to you.

The Court: Yes.

Mr. Williams: After the tapped conversation which I have just read he continued with his question as follows:

"Q. Now, what would that have reference to?

"A. Maybe at the end of the day, I probably had to collect that \$2000, whatever you call it.

"Q. That is almost \$3000, and you just told us that you did not bet heavily with him.

"A. I can win \$3000 with \$20 bets. Eight bets at \$20 a bet would be \$5000.

"Q. That would be a red-letter day?

"A. That could happen.

752 "Q. Do you remember June 22, 1942, being a red-letter day?

"A. No.

"Q. And the Jerry—"if I receive a call from Jerry"—would that be Jerry Catana?

"A. No.

"Q. What Jerry would that be?

"A. I don't know his last name, but he was affiliated with George Sherman.

"Q. In the bookmaking business?

"A. That is right.

"Q. Did O'Connell work for you at any time?

"A. No.

"Q. Did he work for you in the 20's?

"A. Yes.

"Q. In the liquor business?

"A. In the 20's, yes.

"Q. You are still very friendly with him?

"A. Yes.

"Q. Wasn't he in the Coast Guard at one time?

"A. No. His two sons are Coast Guards.

"Q. No, I mean in the 20's.

"A. No."

755 The Court: Well, you have made a specific objection here because there was this reference to wiretapping with Mr. O'Connell on an entirely different occasion. The only point on which that evidence was offered by Mr. Robson was that Mr. O'Connell was connected with Mr. Costello, and his connection with Mr. Costello concerned bootlegging.

Now, to that extent I suppose Mr. Costello is making an admission that he was in the prohibition era engaged in bootlegging. I do not see how that is in any way related to the wiretaps that you are talking about in that testimony. Therefore, I will take the evidence for what it is worth.

Mr. Robson: The next item is at page 584.

756 "Q. Now, going back a few years, you were very close to Arnold Rothstein, weren't you?

"A. Yes.

"Q. And you gambled with him.

"A. No, I never gambled with him.

"Q. You never gambled with Arnold Rothstein?

"A. No.

"Q. You knew him for a long time?

"A. Yes, I knew him.

"Q. You lent him money?

"A. Yes.

757 "Q. And you permitted him to discount your notes?

"A. Yes.

"Q. And you regarded him as a friend of yours?

"A. Well, I thought he was, yes.

"Q. In fact, isn't it true, in an affidavit dated July 14, 1942, you said 'that Mr. Rothstein and myself were personal friends for upwards of 25 years'?

"A. Affidavit?

"Q. Yes, in an affidavit submitted in connection with a lawsuit by the Rothmere Mortgage Corporation against yourself?

"A. I never made that affidavit.

"Q. You didn't?

"A. Not that I recall.

"Q. I will show you a copy of the affidavit and see if it doesn't refresh your recollection?

"A. Who did I make this to?

"Q. It was in the proceeding in the Supreme Court in connection with a motion to dismiss the judgment which had obtained I believe by default or something.

"A. I suppose my lawyer made this thing.

"Q. And you signed it?

"A. I must have signed this affidavit, yes. I probably signed it without—

758 "Q. You gave him the facts?

"A. That is true.

"Q. Isn't it true that you were friends, you and Rothstein were friends for a great many years?

"A. Yes.

"Q. Continuing, 'on many occasions Mr. Rothstein would borrow large sums of money from me'; that is equally true?

"A. That is right.

"On other occasions when I had no available cash to lend Mr. Rothstein, he would ask for and I would give him my note, which Mr. Rothstein would discount at a bank or other lending institution and secure the cash he desired', that is true also?

"A. That is true.

"Q. So in the 20's—and we recall he was killed in November of 1928—

"A. 1928, I believe.

"Q. In the 20's you did have quite a bit of money, isn't that so?

"A. Well, I don't know. I might have. I just don't know.

"Q. Well, in this affidavit you said you advanced large sums of money to him. I think there is one advance which is referred to in the suit of \$30,000?

"A. Well, that was not money. I didn't advance him that money.

"Q. You do say in this affidavit that you did lend him large sums of money?

"A. I remember lending him money but that particular note that you have reference to, that was not money. That was an accommodation note that I gave him.

"Q. You state in this affidavit: 'On many occasions Mr. Rothstein would borrow large sums of money from me', and you have told me that is true?

"A. Yes.

"Q. Now, where did you get these large sums of money from?

"A. Where did I get it?

"Q. Yes.

"A. I might have got it bringing a little whiskey in, that is during prohibition isn't it?

"Q. That is true, you were in the bootlegging business, weren't you?

"A. Yes.

"Q. And you did smuggle whiskey into the country?

"A. Yes.

"Q. You testified to that before the Federal Grand jury. I won't have to read it to you because you admit
760 it here.

"A. That is right.

"Q. And you had an office for a long time at 405 Lexington Avenue, isn't that so?

"A. Yes.

"Q. As early as 1925?

"A. That is right.

"Q. And Jim O'Connell was one of your associates at that time, wasn't he?

"A. That is right. He wasn't my associate. He was working for me at the time.

"Q. What was his job?

"A. Well, he was working for me driving a truck, or something, carrying whisky.

"Q. And were you associated with Bill Dwyer at that time?

"A. No.

"Q. You knew him?

"A. Yes.

"Q. He was in the bootlegging business also?

"A. He was, yes.

"Q. And Vanny Higgins—do you recall him?

"A. No, I never knew him.

"Q. You had heard of him?

761 "A. Yes.

"Q. But he wasn't associated with you at any time?

"A. No.

"Q. Did you own some boats at that time?

"A. No.

"Q. You used boats of others?

"A. Well, yes, chartered a boat or something.

"Q. And your income was large in those years, was it not?

"A. Well, I wouldn't say it was large.

"Q. Well now, taking 1927, for example, you reported \$51,000. That is not small, is it?

"A. I didn't report no \$51,000, Mr. Hogan.

"Q. Well, I have looked up your state report, Mr. Costello and I tell you that is the figure on it.

"A. Well, now, I didn't report that at all. They just assessed me and I paid without making a report.

"Q. I guess it is true that you did not pay any income tax from 1929 to 1936, isn't that so?

"A. No, 1932—1931.

"Q. Isn't it true that in 1936 you filed returns for state income tax for the years 1919 to 1936?

"A. Yes, state; yes. That is right.

762 "Q. So that from 1919 until 1936, you paid no state income tax?

"A. That is right.

"Q. Did you pay any federal taxes during those years?

"A. Yes.

"Q. And then, roughly, you approximated your income for each year, isn't that so?

"A. Yes.

"Q. For each of the 17 years; and you paid back penalties on the 1919 tax for 17 years. Now I tell you that your rough approximation of your tax in 1927 was \$51,000 and that, to the best of your recollection in 1936 was what you made in 1927, isn't that so?

"A. We don't take in one year.

"Q. But I am telling you that is the tax you reported for that year?

"A. That is right.

763 "Q. 1927, you reported it as \$51,000; and in 1929 you listed it at \$48,000, is that right; and in 1930, \$35,000. Those are figures that are approximately correct, isn't that so?

"A. Well, I don't know. I just don't remember just what I did with the state, with them figures. If you have the

record there and you have got it from the state department.

I will say, yes."

764 Mr. Robson: Now reading from the bottom of that page:

"Q. Now this letter dated March 5, 1937, written to Mr. Levy, says: Anshus has prepared the New York State income tax returns for Frank Costello, for the years 1919 to 1932 inclusive, and the following is a summary of the income—and you will note that the income reported for those years, the 13 years, totals \$305,000; isn't that right?

"A. Yes.

"Q. Now, would you say that that money was made in the bootlegging business?

"A. No, I wouldn't say exactly.

"Q. Would you say most of it was?

"A. Maybe most of it, yes.

"Q. Did you have any other occupation in those years?

"A. Well, I was doing a little real estate at that time.

"Q. Did you ever make any money in real estate?

"A. Well, made some moneys, yes.

"Q. Not very much was it? Do you recall any particular real estate transaction in which you made
765 any money?

"A. Well, I had bought a building on West End Avenue and 92nd Street.

"Q. Yes.

"A. And I believe I made a little money there.

"Q. How much would you say?

"A. Well, I would say maybe 25,000.

"Q. On the sale of that building?

"A. Yes.

"Q. Did you take it in your name or in the name of a corporation?

"A. Well, I think it was a corporation at the time.

"Q. Do you remember the name of it?

"A. I think it was Koslo.

"Q. You contend on the sale of that property you profited to the extent of \$25,000?

"A. I think so, about twenty or twenty-five thousand dollars. I just don't remember so far back.

"Q. How much did you pay for the property?

"A. I think we paid about 125,000, I believe.

"Q. Who was associated with you in the purchase of it?

"A. I can't think of his name right now.

"Q. How much of the \$125,000 was yours?

766 "A. I had 50 per-cent of it.

"Q. So that would be \$62,500?

"A. Yes. I think we put up about thirty and then we sold it before we even closed.

"Q. Whatever you put up was proceeds of the liquor business, isn't that right?

"A. It might have been gambling or liquor.

"Q. Gambling and liquor?

"A. I can't distinguish money from the liquor."

The Court: Any objection to that?

Mr. Williams: Yes, your Honor.

The Court: On the ground of wiretapping?

Mr. Williams: Yes, sir.

The Court: The same objection heretofore made?

Mr. Williams: Yes, sir.

767 The Court: I see nothing in there that in any way relates to any wiretapping of Mr. Costello's wire, and I overrule the objection to the questions and answers, or to the section just read, and that will be received in evidence.

772

New York, January 7, 1959;
10:30 o'clock a.m.

776 The Court: . . .

I would like to have the whole transcript, too, as part of the record of the trial. I will want to read that whole transcript to see what reference there is to wiretapping in

there as bearing upon these particular parts that you have said are relevant to this case.

Mr. Robson: At this time, if your Honor please, I would like to offer in evidence again, to the extent of those portions which I plan to read, Government's Exhibit 2 776a for identification, which is the transcript of the testimony of Frank Costello in the matter of Thomas A. Aurelio before the Appellate Division, First Department, on October 25, 1943.

777 Mr. Williams: Your Honor, I make the same objection with respect to this testimony that I made heretofore with respect to the grand jury testimony, . . .

779 The Court: . . .

780 I will have to, therefore, pass upon each one of these statements as they are presented. The objection is overruled.

Mr. Robson: . . . (Reading):

"Q. You say that you got the money you loaned Arnold Rothstein from the slot machine business, is that right?

"A. I didn't say where I got it from. You asked me—

"Q. Where did you get it?

"A. Well, I just don't remember. I might have had it for ten years, I don't know.

"Q. Well, let me show you your grand jury testimony on that, at page 586 (showing witness volume).

781 "A. Yes.

"Q. Now, where did you get it?

"A. My testimony is there. I might have had it from a little bootlegging.

"Q. You were in the bootlegging business, weren't you?

"A. I was.

"Q. You smuggled whiskey into the country, didn't you?

"A. Yes.

"Q. Where was your office?

"A. 405 Lexington Avenue.

"Q. Did you own trucks?

"A. I believe we owned some trucks.

"Q. Chartered boats?

"A. Yes.

"Q. And your income was pretty heavy in those years, wasn't it?

"A. Well, it was profitable.

"Q. Did you ever pay any State Income Tax those years?

"A. No, but I have paid it later.

"Q. Well, when did you pay it?

"A. Mr. Hogan, I think you have the record when
782 I made my settlement, for all the back years.

"Q. I will be glad to show it to you. I show you a copy of a letter written by an accounting firm to George M. Levy. Mr. Levy was your attorney at the time?

"A. Yes, sir.

"Q. And I ask if that refreshes your recollection as to the years?

"A. From 1919 to 1932.

"Q. Yes; you paid no State Tax from 1919 to 1932, is that right?

"A. That is right, and paid them all in 1932.

"Q. And what did it amount to? What is the total amount on which you paid tax (showing witness paper)?

"A. Is this the total, 305, is that it? \$305,000.

"Q. Did you pay any Federal Tax for those years?

"A. No, but I also made a settlement with the Federal Government.

"Q. When did you make the settlement with the Federal Government?

"A. In 1932.

"Q. So that from 1919 to 1932 you made no tax payment to the Federal Government or to the State Government?

783 "A. That is right.

"Q. And you were in the bootlegging business in those years?

"A. Yes."

.

784 "Q. You were going to say that you had done some work between 1916 and 1943 other than gambling, bootlegging and slot machines?

"A. Yes.

"Q. What?

"A. Well, I was associated with Harry Horowitz Novelty Company.

"Q. What work did you do with the novelty company of Harry Horowitz?

"A. It was a novelty company, sold fountain pens, fountain pencils—or pens, rather, and Kewpie Dolls and razor blades.

"Q. Yes.

785 "A. Safety razors, and I worked in there. I packed, sold, acted as sort of a salesman.

"Q. When was this?

"A. Well, I would say from 1917 or 1918 until about 1920."

.

786 Mr. Robson: As I understand it, the exhibit is accepted in evidence to the extent of those portions I have read, and the balance is to remain as part of the record? Is that correct, your Honor?

The Court: The balance is part of the record insofar as Mr. Williams' objection is concerned on the ground of wiretaps, insofar as that is involved.

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789 Mr. Robson: Now, if your Honor please, I have one last piece of evidence—I am sorry, I have one more statement, and that is the statement of the defendant before the State Liquor Authority.

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816 Mr. Robson: (Reading):

"By Mr. Kaitz:

"Q. Do you remember the school you went to?

"Mr. Wolf: Wait a moment. I am going to object to this. I am going to protest against this. It is quite evident to me that this examination is not pertinent to any matter that concerns the Liquor Board Authority, and it is
817 designed to delve into matters of a personal nature of this here witness.

"Mr. Kaitz: These questions, Mr. Wolf, are pertinent to our investigation in that we require answers to the questions put to the witness. The purpose of the investigation hasn't been put to you in full.

"Mr. Wolf: You told me that the purpose of this interrogation was in connection with an application for a license for some concern. You named the concern. The witness is here to give you all the information he has concerning his knowledge of or connection with, with this particular concern or anybody connected with it. If you show me where these personal records going back to his birth, where he was born, or anything at all is connected—

"Mr. Kaitz: I will tell you the nature of the first few questions I will ask, and if you want to advise your client not to answer them, that is all right, but I want to put the questions on the record. It is important for our investigation to get a complete background of the witness so
818 we can establish our case or we can establish we have no case, either one, and for that purpose, we have to get the answers. Now, you may advise your client not to answer them—as you please.

"Mr. Wolf: I brought him voluntarily.

"Mr. Kaitz: I will tell you the type of questions I will ask. I am going to ask about all his residences he can remember, and I am going to ask him about all his employments he can remember. Do you have any objections to those questions?

"Mr. Costello: Yes; I do have objections. I want to stick to the facts.

"Mr. Kaitz: I am building up to the facts and that is usual in an interrogation, Mr. Wolf, as you know."

Now at page 6:

"Q. Can you at this time tell us what type of business you were in?

"A. I don't think that is necessary for me to tell you—I have been in the real estate business.

"Mr. Wolf: Generally, you have been in the real estate business?

"Witness: Yes.

819 "A. (continued) I have been in the real estate business and in the gambling business.

"Mr. Wolf: What else, during Prohibition? You were engaged in bootlegging?

"Witness: Yes."

This is now by Mr. Kaitz:

"Q. What years were you engaged in bootlegging during Prohibition?

"A. From 1923 to 1926.

"Q. Were you in business for yourself?

"A. Yes.

"Q. Did you have any partners?

"A. No.

"Q. Was that business in the nature of an importer or a wholesaler, as I might say, selling to—

"A. Selling to anyone.

"Q. There is a difference. Were you selling to people who sold at retail or were you selling at retail?

"A. No. I sell to individuals.

"Q. You brought whisky into the United States?

"A. That is right.

"Q. From places outside the country?

"A. That is right.

820 "Q. Did you ever have a headquarters during that time?

"A. Yes.

"Q. Can you tell me anybody you dealt with during that period of time?

"A. No; I can't remember. It is too far back."

Now by Mr. Marzullo:

"Q. Where were your headquarters located?

"A. 405 Lexington Avenue."

Then by Mr. Kaitz:

"Q. Did anyone else share that office with you?

"A. No."

Then this question by Mr. Marzullo:

"Q. For how many years were you located at 405 Lexington Avenue?

"A. Three years."

Mr. Marzullo asked this question at page 28:

"Q. When did you first start to sell Whiteley's products prior to Repeal in the United States?

"A. In the years that I was bootlegging.

"Q. What are those years?

"A. Until about '26 or '27, I believe.

"Q. Starting when?

"A. 1923.

821 "Q. From what office did you operate?

"A. 405 Lexington Avenue—where the Chrysler Building is now.

"Q. Did you sell wholesale to other bootleggers or direct to purchasers?

"A. I used to go to Canada, Halifax, and buy and sell it to individuals.

Now by Mr. Kaitz:

"Q. Whom did you speak with up in Canada, do you recall at this time?

"A. I wouldn't even recall. I always had a man go up there and buy for me. There is where we bought King's Ransom, all brands. We never did business direct in Europe.

"Q. Did you make any purchases from the Islands of Miquelon and St. Pierre?

"A. I might have.

"Q. Do you know King Solomon of Boston, or did you know him, I should say?

"A. No.

"Q. Did you ever hear of him?

"A. No; I don't think I have."

Now at page 30:

"Q. A moment ago you said you did business
822 through someone who represented you in Canada.

"A. Yes.

"Q. Who is that person?

"A. He is dead. Fellow named Harry Saucer."

Mr. Williams: How is that spelled?

Mr. Robson: It is spelled here S-a-u-e-e-r (phonetic).

"Was he an American?

"A. Yes; he was an American."

825 Mr. Robson. At this time, your Honor, the Government rests.

829 Mr. Williams: For the purposes of the record, your Honor, I will make the motion to dismiss now, reserve argument until I offer this evidence in the light of your Honor's feeling that it should go in as defensive matter and then renew the motion on the theory that your Honor might wish to take it under—

The Court: All right, that is satisfactory.

830 Mr. Williams: The rules contemplate your Honor could reserve decision and permit evidence to come in and then make your decision at the conclusion.

The Court: All right, I will reserve decision.

853 Mr. Williams: Now, your Honor, there was one line from the Aurelio grand jury testimony which was not read, which I think was relevant to something that was read by Mr. Robson.

Your Honor understands, I am sure, that my objection still runs to this, but in order to complete the context I felt that this particular line which appears, Mr. Robson, at page 108, presumably at the bottom of your page—

Mr. Robson: You referred to the grand jury transcript, didn't you?

Mr. Williams: No, this is the open hearing.

Mr. Robson: Oh, I am sorry. Go ahead.

854. Mr. Williams: 108, your Honor, of the so-called Aurelio testimony in which there were the following questions propounded:

"Q. Now, did you do any work, any other work, from that office to 1943?

"A. Yes.

"Q. Where?

"A. Well, I was in business at Koslo Realty Company.

"Q. When was that?

"A. I have no records here now, probably from 22 to 25."

870 The Court: Anything else?

Both sides rest?

Mr. Robson: Yes, sir.

The Court: The defendant rests?

Mr. Williams: Yes.

The Court: Are there any motions you desire to make now, Mr. Williams?

Mr. Williams: Thank you.

Your Honor, at this time on behalf of the defendant I would like to move for a dismissal of the Government's case but, as I explained to your Honor this morning, I am combining my argument on all of the evidence with this motion for a dismissal, and I thought by proceeding that way I would be serving the Court as well as myself in the economy of time.

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SF 980-226

UNITED STATES OF AMERICA

DECLARATION OF INTENTION

Invalid for all purposes seven years after the date hereof

State of New York,
County of New York, SS:

In the Supreme Court of New York County.

I, FRANK COSTELLO, aged 32 years,
occupation broker, do declare on oath that my personal
description is: Color white, complexion fair, height 5 feet 7 inches,
weight 170 pounds, color of hair brown, color of eyes gray,
other visible distinctive marks none.
I was born in Caserta, Italy
on the 23th day of January, anno Domini 1891; I now reside
at 334 East 108th St, New York City, N. Y.
I emigrated to the United States of America from Naples, Italy
on the vessel unknown; my last
foreign residence was Caserta, Italy; I am married; the name
of my wife is Loretta; she was born at U.S.A.
and now resides at with me.
It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign
prince, potentate, state, or sovereignty, and particularly to Victor Emmanuel III,
King of Italy, of whom I am now a subject;
I arrived at the port of New York in the State of New York on or about the 23th day
of April, anno Domini 1895; I am not an anarchist; I am not a
polygamist nor a believer in the practice of polygamy; and it is my intention to good faith
to become a citizen of the United States of America and to permanently reside therein:
TO WIT my Oath.

Frank Costello
(Original Signature of Deponent)

Subscribed and sworn to before me in the office of the Clerk of said Court
at New York City, N. Y., this 25th day of March,
anno Domini 19 23

[SEAL]

JAMES A. DONEGAN

Clerk of the Supreme Court.

Edward J. ... Special Clerk.

(211)

Form 550-01, 7-1
 REFORMANT NOTICE TO APPLICANT: It is your responsibility to see that this form is completed and returned to the Immigration and Naturalization Service before the date of your interview.

IMMIGRATION FORM NO. 1 PETITION FOR NATURALIZATION

DO NOT WRITE IN THESE SPACES
 For use of officials recording fingerprints

RECORDS EXAMINER

Card Index

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Maximum

Name

Date

File

U.S. DEPARTMENT OF LABOR NATURALIZATION SERVICE

This form is NOT a petition, but is used to obtain essential information, which must be furnished by the applicant BEFORE a petition may be filed.

NOTE FOR CLERK: Read this form to the alien or he may fill it in at his leisure.

TO THE ALIEN: Fill in all the blanks in this form. Be sure the information is correct. When completed, take or mail it to the Naturalization Examiner and he will furnish you instructions. Send your Declaration of Intention with this form.

Take or mail this to—

CHIEF NATURALIZATION EXAMINER,
 1913 Tribune Building, 184 Nassau St.,
 New York, N. Y.

I desire to petition for naturalization in the City of New York, State of New York.
 The following information is furnished that you may arrange for my preliminary examination, and that the necessary papers may be sent to the Chief Clerk.

My full, true, and correct name is Frank Costello ✓
 I have used another name Francisco Castiglia ✓
 (If you have ever used any other name write that name here.)

I find that name incorrect
 The name on my citizenship ticket was Francisco Castiglia
 My mother's maiden name was Mary Saverio Alton

My present residence is Greensboro Hotel 2450 Broadway N.Y. ✓
 My post office address is 2450 Broadway New York New York
 My present occupation is Rest Cafe ✓

I was born on January 26 1891 ✓ Cosenza Italy
 (Month) (Day) (Year) (City or town) (Country)

(a) The place where I took the ship or train which landed me in the United States was Italy ✓
 I landed in the United States at New York City on March 1895 ✓
 (Month) (Year)

(b) I landed in the United States at New York City on April 2 1895 ✓
 (Month) (Day) (Year)

(c) I landed in the United States at New York City on April 2 1895 ✓
 (Month) (Day) (Year)

(d) If by ship: Name of steamship line was passenger
 (e) I arrived as (passenger, steward, domestic seaman, or other) passenger
 (f) The person to the United States I was coming to was Louis Castiglia
 (g) The place in the United States I was going to was New York City
 (h) The names of some of the friends or passengers I traveled with were Mary Saverio Alton
Castiglia and Mary Castiglia
 (i) The ticket on which I came to this country of Italy

EX-101-11c 2

If you came from or through Canada or Mexico, also fill in items (A) to (F) inclusive.

- (A) The place in Canada where I landed was _____
 (B) The place in Canada from which I entered the United States was _____
 (C) On _____
 (D) The place where I was examined for admission into the United States was _____
 (E) If not examined, state why, and give the circumstances of your entry _____
 (F) The place in Canada where I bought my railroad ticket to come to the United States was _____

5. (a) The date of my Declaration (first paper) is March 25 1915
 (b) It was made in the Supreme Court Court, located at New York
 (c) I am married. My wife's name is Loretta Castello
 (d) She was born May 2 1899 New York City
 (e) And now resides at 120 West 11th St New York
 (f) We were married on Sept 25 1914
 (g) I have no children. (In the following blanks write name, date and place of birth, and residence of each child.)

born _____ day of _____ 19____ at _____
 resides at _____
 born _____ day of _____ 19____ at _____
 resides at _____
 born _____ day of _____ 19____ at _____
 resides at _____
 born _____ day of _____ 19____ at _____
 resides at _____

6. If not now, have you ever been married? no
 7. The foreign country of which I am now a subject or citizen is Italy
 8. I can not speak English.
 9. (a) I have resided continuously in the United States since April 2 1895
 (b) I have resided continuously in the State where I now reside since April 2 1895
 10. I have not previously made petition for naturalization (second paper). If so, it was made in the _____
 Court of _____ (City or town.) _____ (State.) _____ (Month.) _____ (Day.) _____ (Year.)

11. If you wish to have your name changed, give full name you desire.
 12. Give names, occupations, and addresses of the two nearest persons who can vouch for you. (If you are a native-born citizen, you must have two persons who can vouch for you. If you are a foreign-born citizen, you must have two persons who can vouch for you. If you are a foreign-born citizen, you must have two persons who can vouch for you.)
 (1st) Harry H. Langer
 (2nd) Frank A. Jones

If applicant is a married man, give name and address of his wife.
 My home is _____

[illegible]

U. S. DEPARTMENT OF LABOR
BUREAU OF INVESTIGATION
WASHINGTON, D. C.

US and NYE since April 2, 1935

PAGE 100 Sept 21, 1934 2/7

SEE INTER 6/7

STATEMENTS OF PETITIONER AND WITNESSES

[illegible]

OFFICE SERIAL NO. 0, 11008 Fees Paid \$ 2.80 U.S.I.R. Stamps \$ 59.00 Cancelled.

THIS INDENTURE made the 22nd day of June, nineteen hundred and twenty five, between KOSLO REALTY CO. INC. a corporation organized under the laws of the State of New York party of the first part, and 666 West End Avenue Corporation, a New York Corporation, party of the second part. WITNESSETH, that the party of the first part, in consideration of One hundred (\$100) dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, its successors and assigns forever. ALL that lot or parcel of land, with the buildings and improvements thereon in the Borough of Manhattan, City, County and State of New York, bounded and described as follows: BEGINNING at a point on the northerly side of 92nd Street, distant 80 feet easterly from the corner formed by the intersection of the northerly side of 92nd Street and the easterly side of West End Avenue, formerly 11th Avenue, thence northerly, parallel with West End Avenue, 99 feet 11 inches; thence easterly, parallel with 92nd Street, 20 feet thence northerly, parallel with West End Avenue, 9½ inches to the centre line of the block; thence easterly, along said centre line of the block 20 feet; thence southerly and parallel with West End Avenue, 100 feet 8½ inches to the northerly side of 92nd Street; thence westerly, along the northerly side of 92nd Street, 40 feet to the point or place of beginning. Said premises being known as 259 West 92nd Street, Subject to a first mortgage in the sum of Forty thousand (\$40,000) dollars, now a lien on said premises. Subject to a second mortgage in the sum of Thirty eight thousand (\$38,000) dollars, on which the sum of \$ 35,600 is due, now a lien on said premises. Subject to a purchase money mortgage in the sum of Forty one thousand two hundred thirty (\$41,230) dollars, given as part payment of the consideration herein, bearing even date and intended to be recorded simultaneously herewith. Subject to any state of facts that an accurate survey may show. Subject to covenants and restrictions in prior deeds, if any, TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises. TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, its successors and assigns forever. And the party of the first part covenants as follows: FIRST. That the party of the first part is seized of the said premises in fee simple, and has good right to convey the same. SECOND. That the party of the second part shall quietly enjoy the said premises. THIRD. That the said premises are free from incumbrances, except as aforesaid. FOURTH. That the party of the first part will execute or procure any further necessary assurance of the title to said premises. FIFTH. That the party of the first part will forever warrant the title to said premises. IN WITNESS WHEREOF, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written. KOSLO REALTY CO. INC. by Louis E Felix, President. (Seal KOSLO REALTY CO. INC. Incorporated, 1924, New York) State of New York, County of New York, ss: On the 22 day of June, nineteen hundred and twenty five, before me came Louis E Felix, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, that he is the President of KOSLO REALTY

1489

375

N Y City, N Y Co. 51 Reg. No. 27033, Kings Co. 22, Reg. No. 7020, Comm exp. Feb. 17, 1927
(Certificate filed Registers Office, New York County EP)(Not subject to recording tax, June
23, 1925 JBD)

Indorsed to be indexed against block 1240 on the land map of the County of New York. Re-
corded preceding at request of N Y Title & Mtge Co. 135 E'way, N Y C. June 23, 1925 at 3
O'clock & 35 Mins P.M.

EXAMINED
M. J.

NOT RECORDED
g m

REGISTER.
9

Office Serial C20365 Fees paid \$2.50. USIR tax stamps \$32. cancelled.

THIS INDENTURE made the first day of December nineteen hundred and twenty four BETWEEN SAMUEL BEILIN AND ANNA BEILIN his wife, both residing at 1155 Longfellow Avenue, Borough of Bronx, County of Bronx, City of New York, party of the first part, and KOSLO REALTY CO INC., a domestic corporation having its office and principal place of business at 217 Broadway, Borough of Manhattan, City of New York, party of the second part: WITNESSETH that the party of the first part in consideration of other good and valuable considerations and one hundred (\$100.00) dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part and assigns forever, ALL that certain lot piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows: BEGINNING at a point on the northerly side of Ninety second Street, distant eighty feet easterly from the corner formed by the intersection of the northerly side of Ninety second Street and the easterly side of West End Avenue, formerly Eleventh Avenue; thence northerly parallel with West End Avenue ninety nine feet eleven inches; thence easterly parallel with Ninety second Street twenty feet; thence northerly parallel with West End Avenue nine and one half inches to the centre line of the block; thence easterly along said centre line of the block twenty feet; thence southerly and parallel with West End Avenue one hundred feet eight and one half inches to the northerly side of Ninety second Street; thence westerly along the northerly side of Ninety second Street forty feet to the point or place of beginning. Said premises being also known as 259 West 92nd Street. Being the same premises conveyed to the party of the first part herein, by Max Weiss by deed dated June 26th 1923, and recorded on July 11th 1923, in the office of the Register, County of New York, in liber 33-5 of conveyances page 435. TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises, TO HAVE AND TO HOLD the premises herein granted unto the party of the second part and assigns forever. Subject to any state of facts which an accurate survey would show. Subject to a first mortgage lien upon which there is now unpaid the sum of \$40000.00 and accrued interest thereon. Subject also to a second mortgage lien upon which there is now unpaid the sum of \$36800.00 and accrued interest thereon. AND said parties of the first part covenants as follows: First. That said parties of the first part is seized of the said premises in fee simple and has good right to convey the same. Second. That the party of the second part shall quietly enjoy the said premises. Third. That the said premises are free from incumbrances except as aforesaid. Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises. Fifth. That said parties of the first part will forever warrant the title to said premises. IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal the day and year first above written. SAMUEL BEILIN (LS) ANNA BEILIN (LS) In presence of M. V. Rosenberg, State of New York County of New York SS: On the second day of December nineteen hundred and twenty four before me came Samuel Beilin and Anna Beilin his wife, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that they executed the same. Michael V. Rosenberg, Comr of Deeds N Y Co 315 Reg 25136 term expires Dec 11 1925 (certificate filed Registers Office

Office Serial No. C11784 Fees Paid \$2.50 U.S.I.-S.4-50 cans

This Indenture, made the 12th day of August, nineteen hundred and twenty five, between Mary C. Newell, of the City of Chicago, County of Cook and State of Illinois party of the first part, and Knels Realty Co., Inc., a corporation duly organized under laws of New York State, having its principal office at No. 406 Lexington Avenue, New York City, party of the second part, witnesseth, that the party of the first part, in consideration of the sum of one dollar and other good and valuable consideration, dollars lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, its successors and assigns forever. All that certain lot, piece or parcel of land, situate, lying and being in the Borough of the Bronx, in the City, County and State of New York, which on a certain map entitled "Map of 108 lots, belonging to the Hudson P. Rose Company, known as the Coeter Estate, situated in the Borough of the Bronx, New York City" surveyed by E. A. Holden, C. E. City Surveyor, New York May 26th, 1906, which map was filed as No. 1115A, in the office of the Register of the County of New York, on the 26th day of May A. D. 1906, is known and designated as and by the lot number one hundred and four. (104.) together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the premises herein granted unto the party of the second part, its successors and assigns forever. And said Mary C. Newell covenants as follows: ...First..That said Mary C. Newell is seized of the said premises in fee simple, and has good right to convey the same....Second..That the party of the second part shall quietly enjoy the said premises....Third..That the said premises are free from incumbrances;..Fourth..That the party of the first part will execute or procure any further necessary assurance of the title to said premises....Fifth..That said Mary C. Newell will forever warrant

Office Serial No. C11785 Fees Paid \$1.50 U.S.L.S.S. \$1.50 Lano

This Indenture, made the 12th day of August, nineteen hundred and twenty five, between Minnie R. Newell, of the City of Chicago, County of Cook and State of Illinois party of the first part, and Apple Realty Co., Inc., a corporation duly organized under the laws of New York State, having its principal office at No. 405 Lexington Avenue, New York City, party of the second part, witnesses, that the party of the first part, in consideration of the sum of one dollar and other good and valuable consideration dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, its successors and assigns forever, All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of the Bronx, in the City County and State of New York, which on a certain map entitled "Map of 106 lots, belonging to the Madison Park Estate Company, known as the Foster Estate, situated in the Borough of the Bronx, New York City" surveyed by A. D. Holder, C. E. City Surveyor, N. Y. May 25th, 1906 which map was filed as No. 1115 A. in the office of the Register of the County of New York, on the 26th day of May, A. D. 1906 are known and designated as and by the lot numbers one hundred and five (105) and one hundred and six (106), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the premises herein granted unto the party of the second part, its successors and assigns forever. And said Minnie R. Newell covenants as follows: First, that said Minnie R. Newell is seized of the said premises in fee simple, and has good right to convey the same. Second, That the party of the second part shall quietly enjoy the said premises. Third, That the said premises are free from incumbrances. Fourth, That the party of the first part will execute or procure any further necessary assurance of the title to said premises. Fifth, That said Minnie R. Newell will forever warrant the title to said premises. In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written. Minnie R. Newell (LS). In presence of Thomas A. Kruppner Notary Public (LS) State of Illinois; County of Cook; on the twelfth day of August, nineteen hundred and twenty five before me came Minnie R. Newell to me known to be the individual described in, and who executed the foregoing instrument, and acknowledged that she executed the same. Thomas A. Kruppner Notary Public Bronx Public (LS). State of Illinois, Cook

from the records and files in my office; that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to the said proof of acknowledgment is genuine..The law of Illinois does not require the impression of the seal of a Notary Public to be filed in the County Clerk's office. In testimony whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 12th day of Aug. 1925 Robert M. Sweitzer, County Clerk (LS). Not subject to recording tax. & DA. Indorsed to be indexed against block No. 5339 on the land map of the County of Bronx. Recorded preceding at request of Harold L. Kunetler, Sept 3, 1925 at 2 o'clock 59 mins. P.M.

Edward Cole
Register
ell

Frank: Cattle

5125 Adcroft Ave. - Jamaica, L.I.

residing at Huntington, L.I., N.Y.

2020

2

The above passport is a passport of good moral character, entitled to the protection of the Constitution of the United States, and the passport is the only one in the world, in my opinion, to be admitted to the United States.

1 Frank H. Goss
Harry C. Barnes

Subscribed and sworn to before me by the above-named petitioner and witnesses in the City of New York, N. Y., this

also Domain 10

Phenix

MEMORANDUM OF CONTINUANCES

REASONS FOR CONTINUANCE

NAMES OF SUBSTITUTED WITNESSES

Occupation

Residence

Occupation

Residence

2136470
Continuance of Naturalization, E.A.

Issued on the

day of

These witnesses were examined and being qualified after questioning and duly sworn by the Commissioner.

premises. THIRD. That the said premises are free from incumbrances, except as aforesaid. FOURTH. That the party of the first part will execute or procure any further necessary assurance of the title to said premises. FIFTH. That the party of the first part will forever warrant the title to said premises. IN WITNESS WHEREOF, the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written. KOSLO REALTY CO. INC. by Louis E. Felix, President. (Seal KOSLO REALTY CO. INC. Incorporated, 1924, New York) State of New York, County of New York, ss: On the 22 day of June, nineteen hundred and twenty five, before me came Louis E. Felix, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York, that he is the President of KOSLO REALTY CO. INC. the corporation described in and which executed the foregoing instrument, that he knows the seal of said corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. Bessie Brandel, Comm of Deeds,

to said premises. IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal the day and year first above written. SAMUEL BEILIN (LS) ANNA BEILIN (LS) In presence of M. V. Rosenberg, State of New York County of New York SS: On the second day of December nineteen hundred and twenty four before me came Samuel Beilin and Anna Beilin his wife, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that they executed the same. Michael V. Rosenberg, Comr of Deeds N.Y. Co 315 Reg 25136 term expires Dec 11 1925 (certificate filed Registers Office New York County 17) (Not subject to recording tax Dec 3 1924 BPP). Indorsed to be indexed against block 1240 on the land map of the County of New York, recorded preceding at request of Louis Felix 217 Bay N.Y. C Dec 3 1924 at 1.10 P. M.

Anna Beilin
REGISTER

217

hereto; set his hand and seal the day and year first above written. Mary C. Howell
(LS). In presence of Thomas A. Krippner Notary Public (LS). State of New York; County
of Cook; ss; On the twelfth day of August, nineteen hundred and twenty five, before
me came Mary C. Howell, to me known to be the individual described in, and who executed
the foregoing instrument, and acknowledged that she executed the same. Thomas A.
Krippner Notary Public (LS). State of Illinois; Cook County; ss; I, Robert M. Sweitzer,
County Clerk of the County of Cook, do hereby Certify that I am the lawful custodian
of the official records of Notaries Public of said County and as such officer am
duly authorized to issue certificates of magistracy, that Thomas A. Krippner whose
name is subscribed to the proof of acknowledgment of the annexed instrument, in
writing, was at the time of taking such proof of acknowledgment, an Notary Public
in and for Cook County, duly commissioned, sworn, and acting as such and authorized
to take acknowledgments and proofs of deeds or conveyances of lands, tenements or
hereditaments, in said State of Illinois and to administer oaths; all of which appears

Office Serial No. C11785 Fees Paid \$2.50 U.S.I.R.S. \$3.50 and

This Indenture, made the 12th day of August, nineteen hundred and twenty five, between Minnie R. Newell, of the City of Chicago, County of Cook and State of Illinois party of the first part, and Apple Realty Co., Inc., a corporation duly organized under the laws of New York State, having its principal office at No. 405 Lexington Avenue, New York City, party of the second part, witnesseth, that the party of the first part, in consideration of the sum of one dollar and other good and valuable consideration dollars, lawful money of the United States, paid by the party of the second part, does hereby grant and release unto the party of the second part, its successors and assigns forever, All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of the Bronx, in the City County and State of New York, which on a certain map entitled "Map of 100 lots, belonging to the Madison P. Rose Company, known as the Foster Estate, situated in the Borough of the Bronx, New York City" surveyed by A. D. Holder, C. E. City Surveyor, N. Y. May 25th, 1906 which map was filed as No. 1115 A. in the office of the Register of the County of New York, on the 26th day of May, A. D. 1906 are known and designated as and by the lot numbers one hundred and five (105) and one hundred and six (106), together with the appurtenances and all the estate and rights of the party of the first part in and to said premises. To have and to hold the premises herein granted unto the party of the second part, its successors and assigns forever. And said Minnie R. Newell covenants as follows:.. First, that said Minnie R. Newell is seized of the said premises in fee simple, and has good right to convey the same. Second, That the party of the second part shall quietly enjoy the said premises. Third, That the said premises are free from incumbrances. Fourth, That the party of the first part will execute or procure any further necessary assurance of the title to said premises. Fifth, That said Minnie R. Newell will forever warrant the title to said premises. In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written. Minnie R. Newell (LS). In presence of Thomas A. Krupner Notary Public (LS) State of Illinois; County of Cook; on the twelfth day of August, nineteen hundred and twenty five before me came Minnie R. Newell to me known to be the individual described in, and who executed the foregoing instrument, and acknowledged that she executed the same... Thomas A. Krupner Notary Public Bronx Public (LS). State of Illinois, Cook

County; ss: I, Robert M. Sweltzer, County Clerk of the County of Cook, do hereby certify that I am the lawful custodian of the official records of Notaries Public of said County and as such officer am duly authorized to issue certificates of magistracy, that Thomas A. Krippner whose name is subscribed to the proof of acknowledgment of the annexed instrument, in writing, was at the time of taking such proof of acknowledgment a Notary Public in and for Cook County, duly commissioned, sworn, and acting as such and authorized to take acknowledgments and proofs of deeds or conveyances of land, tenements or hereditaments, in said State of Illinois, and to administer oaths; all of which appears from the records and files in my office, that I am well acquainted with the handwriting of said Notary and verify believe that the signature to the said proof of acknowledgment is genuine. The law of Illinois does not require the impression of the seal of a Notary Public to be filed in the County Clerk's Office. In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County this 12th day of Aug. 1925. Robert M. Sweltzer, County Clerk (LS). Not subject to recording tax. \$DM. Indexed to be indexed against block No. 5339 on the land map of the County of Bronx. Recorded preceding at request of Harold L. Kanstler, Sept 2, 1925 at 2 o'clock 59 mins. P.M.

EXA

Jan

George J. ...
Register

Office Serial No C15231 Fees Paid \$2.50 N.Y.C. \$32.50 paid.

THIS INSTRUMENT, made the 26th day of October, nineteen hundred and twenty five
Between Claire Building Corporation, a corporation organized under the laws
of the State of New York, party of the first part and Koolo Realty Co Inc, a
domestic corporation having its office and principal place of business at 217
Broadway, Borough of Manhattan, City of New York, party of the second part, WITNESSETH
that the party of the first part in consideration of other good and valuable
considerations and one hundred (\$100.00) dollars lawful money of the United
States, paid by the party of the second part, does hereby grant and release
unto the party of the second part its successors, and assigns forever all that
certain lot, piece or parcel of land situate lying and being in the Borough
and County of Bronx City and State of New York known and designated on a certain
map entitled Map of Highbridgeville, in the Town of West Farms County of Westchester
New York, dated Westchester February 25, 1851, by Andrew Findlay, Surveyor, and
filed in Westchester County on July 3, 1851 as Map No 147, as part of lot No 41
also all that portion of land formerly lying in the bed of Bremer Avenue now
closed adjoining said lot No 41 on the west thereof bounded and described as
follows: Beginning at a point on the easterly side of Nelson Avenue distant 100.27
feet southerly from the corner formed by the intersection of the easterly side
of Nelson Avenue and the southerly side of West 167th Street said point being
a line in continuation of the division line between lots 41 and 42 as shown on
said map as prolonged to the easterly side of Nelson Avenue running thence
southerly along the easterly side of Nelson Avenue 100.28 feet to a point in the
easterly side of Nelson Avenue where the division line between lots Nos 40 and
41 if prolonged would intersect the same thence easterly along said line as
prolonged and along the division line between lots Nos 40 and 41, 111.41 feet

thence northerly at right angles or nearly so to said last mentioned course
100 feet to the division line between lots Nos. 41 and 42 as shown on said map
and thence westerly along said division line and a line in prolongation of the
same 104.02 feet to the easterly side of Nelson Avenue at the point or place
of beginning be the said several distances and dimensions more or less.. together
with the appurtenances and all estate and rights of the party of the first part
in and to said premises.. TO HAVE AND TO HOLD the premises herein granted unto
the part of the second part its successors and assigns forever. The party of the
second part has this day executed and delivered to the party of the first part
herein a purchase money mortgage in the sum of \$30,000.00 covering the above
described premises and intended to be recorded simultaneously herewith. And the
party of the first part covenants as follows: First. That the party of the first
part is seized of the said premises in fee simple and has good right to convey the
same. Second. That the party of the second part shall quietly enjoy said premises.
Third. That said premises are free from incumbrances, except as aforesaid.. Fourth
That the party of the first part will execute or procure any further necessary
assurance of the title to said premises.. Fifth. That the party of the first part
will forever warrant the title to said premises IN WITNESS WHEREOF the party
of the first part has caused its corporate seal to be hereunto affixed and
these presents to be signed by its duly authorized officer the day and year first
above written. Claire Building Corporation by A. Blumenthal Pres. (Corporate
Seal Claire Building Corporation New York 1921) State of New York County of New
York ss On the 26th day of October nineteen hundred and twenty five, before
me came Adolph Blumenthal to me known who being by me duly sworn did depose and
say that he resides in Borough of Manhattan City of New York, that he is President
of Claire Building Corporation, the corporation described in and which executed
the foregoing instrument that he knows seal of said corporation that seal affixed
to said instrument is such corporate seal that it was so affixed by order of
board of Directors of said corporation that he signed his name thereto by like
order. Michael V. Rosenberg, Com. of Deeds Bx Clks No 43 Reg. No 3056, Term exp
Dec 11, 1925 Cert Filed. Not subject to recording tax. WDA. Indexed to be indexed
against Block No. 2513.. on the land map of the County of Bronx recorded
preceding at request of Michael V. Rosenberg, Oct 24, 1925 at 11 O'Clock and 10
nine A.M.

Edward Poling

Office Serial No C15232 Fees Paid \$2.50 U.S.I.R.S. \$45.00 same.

THIS INDENTURE made the 26 day of October, nineteen hundred and twenty five, between Claire Building Corporation, a corporation organized under the laws of the State of New York party of the first part and Koslo Realty Co Inc, a domestic corporation, having its office and principal place of business at 217 Broadway, Borough of Manhattan City of New York, party of the second part, WITNESSETH that the party of the first part in consideration of other good and valuable considerations and one hundred (\$100.00) dollars lawful money of the United States paid by the party of the second part does hereby grant and release unto the party of the second part its successors and assigns forever, all that plot of land in the Borough of Bronx City of New York bounded and described as follows: -- Beginning at the corner formed by the intersection of the easterly side of Nelson Avenue with the southerly side of West one hundred and sixty seventh Street running thence southerly along the easterly side of Nelson Avenue one hundred and twenty seven one hundredths feet to a point therein intersected by a line in prolongation of the division line between lots 41 and 42 as shown on a certain map entitled Map of Uxbridgeville in the Town of West Farms County of Westchester, New York dated Westchester February 25, 1851, by Andrew Findlay, Surveyor and filed in Westchester County on July 3, 1851, Map No 147, thence easterly along said line as prolonged and along the said division line between lots 41 and 42 on said map one hundred and seven and forty one one hundredths feet thence northerly at right angles to the southerly side of West one hundred and sixty seventh Street one hundred feet to the southerly side of West one hundred and sixty seventh Street thence westerly along the said southerly side of West one hundred and sixty seventh Street, one hundred feet to the corner aforesaid at the point or place of beginning... together with the appurtenances and all estate and rights of the party of the first part in and to said premises. TO HAVE AND TO HOLD the premises herein granted unto the party of the second part its successors and assigns forever, the party of the second part has this day executed and delivered to the party of the first part herein a purchase money mortgage in the sum of \$40,000.00 covering the above described premises and intended to be recorded simultaneously herewith, and the party of the first part covenants as follows

UNIFORM FICHE 11.
Mortgage. (N.Y. Co. Reg. M 2-Special-New Form.)

OFFICE SERIAL NO. M 17791

FEES PAID \$ 4.90

THIS MORTGAGE, made the 22nd day of June nineteen hundred and twenty five between 666 WEST END AVENUE CORPORATION, a New York corporation

and KOSLO REALTY CO. INC. a New York corporation

the mortgagee.

WITNESSETH, that to secure the payment of an indebtedness in the sum of Forty one thousand two hundred thirty (\$41,230.) dollars,

lawful money of the United States, to be paid on November 2, 1925, with interest thereon at the rate of six per cent per annum, payable quarter-annually, beginning with the day of September, 1925 according to a certain bond or obligation bearing even date herewith, the mortgagee here- by mortgages to the mortgagee, ALL that lot of parcel of land, with the and improvements thereon, in the Borough of Manhattan, City, County and State of New York, bounded and described as follows: BEGINNING at a point on the northerly side of 92nd Street distant 80 feet easterly from the corner formed by the intersection of the north- erly side of 92nd Street and the easterly side of West End Avenue, formerly 11th Avenue; thence northerly, parallel with West End Avenue, 99 feet 11 inches; thence easterly, par- allel with 92nd Street, 20 feet; thence northerly, parallel with West End Avenue 9 1/2 inches to the centre line of the block; thence easterly, along said centre line of the block, 20 feet; thence southerly and parallel with West End Avenue, 100 feet 8 1/2 inches to the northerly side of 92nd Street; thence westerly, along the northerly side of 92nd Street, 40 feet to the point or place of beginning. Said premises being known as 259 West 92nd Street. The mortgagor or then owner of the premises shall have the right and option to pay off the said mortgage at any time prior to its due date on ten days notice in writ- ing to the mortgagee. This is a purchase money mortgage, given to secure a part of the consideration for said premises, as evidenced by deed bearing even date, and intended to be recorded simultaneously herewith.

Official Serial Number M 17791
Discharged MORTGAGE FILE DEC 24 1925
by a certificate recorded in Liber 17791 of Discharge of Mortgages
Darius Mathews

Corporation New York 1921) State of New York County of New York ss On the 26 day
of October nineteen hundred and twenty five before me Jane Adolph Blumenthal,
to me known who being by me duly sworn did depose and say that he resides in
borough of Manhattan New York City, that he is President of Claire Building
Corporation the corporation described in and which executed the foregoing
instrument that he knows seal of said corporation that seal affixed to said
instrument is such corporate seal that it was so affixed by order of board of
directors of said corporation that he signed his name thereto by like order.
Michael V. Rosenberg, Comm. of Deeds, Ex Ciks No 43 Reg. No 3056 Form exp Dec. 11.
Cert. Filed. Not subject to recording tax. WDA. Indorsed to be indexed against
Plot No. 2515.. On the land map of the County of Bronx Recorded preceding at
request of Michael V. Rosenberg. Oct 29, 1925 at 11 O'Clock and 10 mins A.M.

EXAMINED
27

Edward Polak
Register
OS

CITY OF NEW YORK, COUNTY OF NEW YORK, ss.
 I, ARTHUR D. WATSON, County Clerk and Clerk of the Supreme Court, New York County, do hereby certify that I
 have a copy of the original thereof filed in my office and that I have a true and correct copy
 of the whole thereof. IN WITNESS WHEREOF I have hereunto set my hand and official seal at
 New York City, New York, this 25 day of FEB, 1953.

PAID WITHOUT
 OPEN EACH PAGE

Arthur D. Watson
 COUNTY CLERK AND CLERK OF THE SUPREME COURT, NEW YORK COUNTY

STATE OF NEW YORK—OFFICE OF THE SECRETARY OF STATE
 CORPORATION BUREAU.

ALBANY, New York, 1954

Received from KOBLO REALTY CO., INC.

Ten Dollars.

in payment of tax under section 180 of the Tax Law, as follows: 1. 20 of 1 per cent on

\$ 5000 consisting of 50 shares per value \$ 100 each, \$ 10.00

cents per share on 0 shares without per value, \$

JAMES A. HAMILTON, Secretary of State.

By *[Signature]*

Cashier

GOVERNMENT'S
 EXHIBIT,
 U. S. Dist. Court
 S. D. of N. Y.
 JAN. 5

ARTICLE II. INCORPORATION

- of -

KOSLO REALTY CO., INC.

(Incorporated under Article II of the Stock Corporation Law)

Section 1: The corporation, for the purpose of forming and carrying out its business, shall be a Stock Corporation under the laws of the State of New York, and its articles of incorporation shall be as follows:

Section 2: The name of the corporation shall be KOSLO REALTY CO., INC.

Section 3: The purposes for which it is to be formed are as follows:

To conduct a general real estate business; to purchase, lease, sell, exchange or otherwise acquire and dispose of real property, improved or unimproved, and lands, or any interest therein; to erect, construct and alter houses, buildings or works of every description on any land of the company, or upon any other lands, and to rebuild, enlarge, alter and improve existing houses, buildings or works thereon; to mortgage or otherwise dispose of lands, houses, buildings and other property of the company; to loan upon the property of the corporation and to take mortgages and assignments of mortgages on the same, and to loan out money of the corporation upon bond and mortgage, and generally to conduct the business of the improvement and development of real property and to further carry on the business of a realty company.

To purchase real estate, make and purchase materials for the construction of buildings, erection of buildings, own, manage, operate and lease and sell buildings, to tract for the construction, alteration, improvement, and destruction of buildings of every kind and description.

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and generally to carry on the business of builders, decorators, wreckers, dealers in new and second-hand building materials and general contractors; to manufacture, purchase, hire or otherwise acquire, own, hold, use and dispose of engines, trucks and all other appliances and materials necessary or desirable in carrying on its business.

To transact a general real estate agency and brokerage business including the management of estates; to act as agent, broker and attorney in fact for any person, estate or corporation, buying, selling and dealing in real estate and any and every estate and interest therein, and other personal property whatsoever.

To manufacture, purchase or otherwise acquire, to hold, pledge, sell and deal in products, materials, goods, wares and merchandise and personal property, accepting bills of exchange of whatever kind, nature and description; and to receive, purchase, lease, construct and operate factories, warehouses and stores and other structures.

To buy or otherwise acquire any inventions, improvements, processes, trade marks and copyrights, and any letters patent, designs, trade names of the United States or other countries, and to use, improve and develop and sell and lease patents and all rights in respect to the same or any of them.

To buy, lease or otherwise acquire the whole or any part of the business, and will and assets of any person, firm or corporation engaged in a business of the same general character as that for which this corporation is organized.

To purchase, sell, hold and dispose of the stocks, bonds, debentures or other securities of any corporation, domestic or foreign, and issue in exchange therefor, its stocks or bonds or other obligations, and while owner of any

GR.

such stock, to possess and exercise in respect thereof the rights, powers and privileges of the individual owner or holders thereof, and to exercise any and all other powers thereon.

To conduct any and all of its business and to do one or more of the acts and things herein set forth for purposes, in any of the states, territories or lands of the United States, or in any foreign country and and the said corporation may hold, purchase, receive, convey or dispose of real or personal property (including choses in action) of every kind, but of other states than the State of New York; but the corporation shall do no act or thing forbidden by law to a corporation organized under the Stock Corporation Law of the State of New York.

Article. The amount of the capital stock to Five Thousand (\$5,000) Dollars, is authorized.

Article. The officers and directors of the corporation shall be elected by the stockholders at the annual meeting of the corporation.

REC-20-55 00103 • • • -T I 6 M

STUD No. 3539
PAGES 1
TOTAL 1472
FEB 25 1955

COPIES 1
FEB 25 1955

6R

Urmie Matthews

2313722

OFFICE SERIAL NO. 3 2854 FEE PAID 82.00

KNOW ALL MEN BY THESE PRESENTS That Koslo Realty Co. Inc a Domestic Corporation, does hereby certify That a certain Indenture of Mortgage bearing date the 23rd day of June 1935 made and executed by 536 West End Avenue Corporation to it, to secure payment of the principal sum of Forty One Thousand Two Hundred and Thirty (41,200.00) Dollars and interest and duly Recorded in the Office of the Register of the County of New York in Liber 353 Mortgages page 179 on the 23rd day of June 1935, IS PAID AND DO hereby consent that the same be discharged of Record. Dated the 31st day of December 1935, Koslo Realty Co. Inc., By Frank Costello, President, In presence of Louis E. Foley. City & County of New York 33.

On this 22nd Day of December 1925, before me personally came Frank Costello, to me known and who being by me duly sworn did depose and say that he Resides in the Borough of Queens City of New York; that he is the President of the Koslo Realty Co. Inc., the corporation described in and which executed the foregoing instrument that he knows the seal of said corporation; that the seal affixed to said instrument is such seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order Isadore A. Rabinow.. Commissioner of Deeds N.Y. Co. Clerks No. 65 Comm Expires 3/2/27. State of New York County of New York City of New York SS.: I, James A. Donegan, Clerk of the County of New York and also Clerk of the Supreme Court in and for said County DO HEREBY CERTIFY That said Court is a Court of Record having by law a seal That Isadore A. Rabinow whose name is subscribed to the Certificate of proof of acknowledgment of the Annexed instrument, was at the time of taking the same a Commissioner of Deeds in and for said City and County duly commissioned and sworn and qualified to act as such that as such Commissioner of Deeds he was duly authorized by the laws of the State of New York to administer oaths and affirmations to take affidavits and certify the acknowledgment and proof of Deeds and other written instruments to be read in evidence or Recorded in this State and Further that I am well acquainted with the handwriting of such Commissioner of Deeds and verily believe that his signature to such proof or acknowledgment is genuine IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at the City of New York in the County of New York this 24, Day of Dec 1925, James A. Donegan. Clerk (LS) RECORDED Preceding Dec 24, 1925 at 12.45

EXAMINED

Ann M. MacLeus

REGISTER

TOGETHER with all fixtures and articles of personal property, now or hereafter attached to, or used in connection with, the premises, all of which are covered by this mortgage.

And the mortgagor covenants with the mortgagee as follows:

1. That the mortgagor will pay the indebtedness as hereinbefore provided.
2. That the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee.
3. That no building on the premises shall be removed or demolished without the consent of the mortgagee.
4. That the whole of said principal sum shall become due after default in the payment of any installment of principal or of interest for thirty days, or after default in the payment of any tax, water rate or assessment for thirty days after notice and demand.
5. That the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.
6. That the mortgagor will pay all taxes, assessments or water rates, and in default thereof, the mortgagee may pay the same.
7. That the mortgagor within six days upon request in person or within thirty days upon request by mail will furnish a statement of the amount due on this mortgage.
8. That notice and demand or request may be in writing and may be served in person or by mail.
9. That the mortgagor warrants the title to the premises.
10. That in case of a sale, said premises, or so much thereof as may be affected by this mortgage, may be sold in one parcel.
11. That the whole of said principal sum shall become due at the option of the mortgagee after default for thirty days after notice and demand in the payment of any installment of any assessment for local improvement heretofore or hereafter laid, which is or may become payable in annual installments, and which has affected, now affects or hereafter may affect the said premises, notwithstanding that such installments be not due and payable at the time of such notice and demand; and also that the whole of said principal sum shall become due at the option of the mortgagee, upon the actual or threatened demolition or removal of any building erected or to be erected upon said premises.
12. In the event of the passage after the date of this mortgage of any law of the State of New York, deducting from the value of land for the purposes of taxation any lien thereon, or changing in any way the laws for the taxation of mortgages or debts secured by mortgage for State or local purposes, or the manner of the collection of any such taxes, so as to affect this mortgage, the holder of this mortgage and of the debt which it secures, shall have the right to give thirty days' written notice to the owner of the land requiring the payment of the mortgage debt. If such notice be given, the said debt shall become due, payable and collectible at the expiration of said thirty days.
13. That the holder of this mortgage, in any action to foreclose it, shall be entitled (without notice and without regard to the adequacy of any security for the debt), to the appointment of a receiver of the rents and profits of said premises; and in the event of any default in paying said principal or interest, such rents and profits are hereby assigned to the holder of this mortgage as further security for the payment of said indebtedness.
14. If any action or proceeding be commenced (except an action to foreclose this mortgage or to collect the debt secured thereby), to which action or proceeding the holder of this mortgage is made a party, or in which it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by the holder of this mortgage for the expense of any litigation to prosecute or defend the rights and lien created by this mortgage (including reasonable counsel fees), shall be paid by the mortgagor, together with interest thereon at the rate of six per cent. per annum, and any such sum and the interest thereon shall be a lien on said premises, prior to any right, or title to, interest in or claim upon said premises attaching or accruing subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage and by the bond which it secures. In any action or proceeding to foreclose this mortgage, or to recover or collect the debt secured thereby, the provisions of law respecting the recovery of costs, disbursements and allowances shall prevail unaffected by this covenant.

IN WITNESS WHEREOF, this mortgage has been duly executed by the mortgagor.

In presence of

666 West End Avenue Corporation,

by Paul P. Gettinger, President

(Seal: 666 WEST END AVENUE CORPORATION, Incorporated, 1925 New York)

State of
County of

On the
before me came

ss.:
day of

, nineteen hundred and

to be the individual described in, and who executed, the foregoing instrument, and acknowledged that

, to me known
executed the same.

State of New York
County of New York

ss.:

Office Serial No. C16914 Fees paid \$2.50

This indenture made the 15th day of July, 1916 between Mosko Realty Co. Inc. a corporation organized under the laws of State of New York, party of first part and R.G. & F. Construction Corporation a domestic corporation having its office and principal place of business at 2 East 167th Street, Borough of Bronx, City of New York, party of second part. Witnesseth that party of the first part in consideration of other good and valuable considerations and one hundred (\$100) dollars lawful money of United States paid by party of second part, does hereby grant and release unto party of second part, its successors and assigns forever, all that lot piece or parcel of land with the buildings and improvements thereon in the Borough and county of Bronx, City and State of New York, known and designated on certain map entitled "Map of Highbridgeville in Town of West Farms, county of Westchester, New York" dated Westchester February 25, 1851, by Andrew Findlay, surveyor and filed in Westchester county on July 3, 1851 as Map no. 147 as part of lot no. 41 and also all that portion of land formerly lying in the bed of Bremer Avenue now closed, adjoining said lot no. 41 on the west thereof, bounded and described as follows. Beginning at point on easterly side of Nelson Avenue, distant 100.27 feet southerly from corner formed by intersection of easterly side of Nelson Avenue and southerly side of West 167th Street, said point being a line in continuation of the division line between lots 41 and 42 as shown in said map as prolonged to easterly side of Nelson Avenue, running thence southerly along easterly side of Nelson Avenue, 100.28 feet to point in easterly side of Nelson Avenue where the division line between lots nos. 40 and 41 if prolonged would intersect the same, thence easterly along said line as prolonged and along division line between lots nos. 40 and 41, 111.41 feet, thence northerly at right angles or nearly so to said last mentioned course 100 feet to division line between lots nos. 41 and 42 as shown on said map and thence westerly along said division line and a line in prolongation of same 104.02 feet to easterly side of Nelson Avenue at the point or place of beginning, be the said several distances and dimensions more or less. Together with buildings and improvements thereon erected. Said premises being also known as and by street Nos. 114-46 Nelson Avenue. Together with appurtenances and all estate and rights of party of first part in and to said premises. To have and to hold the premises herein granted unto party of second

Fifth. That party of first part will forever warrant the title to said premises. In witness whereof the party of first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written. Koslo Realty Co. Inc. by Samuel Beilin, Secretary (Corporate seal, 1924, N.Y. Koslo Realty Co. Inc.) State and County of New York, ss. On the 15th day of July, 1926 before me came Samuel Beilin to me known who being by me duly sworn did depose and say that he resides in Boro of Bronx, New York City, that he is the Secretary of Koslo Realty Co. Inc. the corporation described in and which executed the foregoing instrument, that he knows seal of said corporation that seal affixed to said instrument is such corporate seal, that it was so affixed by order of board of directors of said corporation, and that he signed his name thereto by like order. Michael V. Rosenberg, Comm. of Deeds, N.Y.C. Bronx Co. Reg. 25022. Term exp. March 16, 1928. Cert filed. Not subject to recording tax WDA. Indorsed to be indexed against block 2513, lot Pt. 58 on land map of county of Bronx. Recorded preceding at request of Morris Grossman. September 4, 1926 at 9 o'clock and 56 mins. A.M.

Louis A. Schoffel

Examined ..F.G.

Register..F.G.

Office Serial No-C-14578--Fees paid \$2.50

This indenture made the 15th day of July nineteen hundred and twenty-six between KOSLO HEALTHY CO INC a corporation organized under the laws of the State of New York party of the first part and R.G. & F Construction Corporation a domestic corporation having its office and principal place of business at 2 East 167th Street Borough of Bronx City of New York party of the second part-witnesseth that the party of the first part in consideration of other good and valuable consideration and One hundred (\$100.00) dollars lawful money of the United States paid by the party of the second part does hereby grant and release unto the party of the second part its successors and assigns forever- All that certain plot piece or parcel of land situate lying and being in the Borough and County of the Bronx, City and State of New York bounded and described as follows- Beginning at the corner formed by the intersection of the southerly side of East 167th Street with the easterly side of Nelson Avenue and running thence southerly along the easterly side of Nelson Avenue one hundred and twenty-seven one-hundredths feet to a point therein intersected by a line in prolongation of the division line between lots 41 and 42 as shown on a certain map entitled "Map of Highbridgeville, in the Town of West Farms County of Westchester New York" dated Westchester February 25, 1851 by Andrew Findlay Surveyor and filed in Westchester County Records July 8, 1851 as Map No-417 thence easterly along said line as prolonged and along the said division line between lots 41 and 42 on said map one hundred and seven and forty-

one one hundredths feet; thence northerly at right angles to the southerly side of East one hundred and sixty-seventh Street one hundred feet to the southerly side of East One hundred and sixty-seventh Street; thence westerly along the said southerly side of East One hundred and sixty-seventh Street one hundred feet to the corner aforesaid at the point or place of beginning--together with the buildings and improvements thereon erected--said premises being also known as and by the street Nos-1150-52 Nelson Avenue. together with the appurtenances and all the estate and rights of the party of the first part in and to said premises--do have and to hold the premises herein granted unto the party of the second part its successors and assigns forever- Subject to any state of facts that an accurate survey would show-Subject to present leases lettings and tenancies-Subject to a first mortgage lien in the sum of \$150,000 and accrued interest thereon-Subject also to a second mortgage lien originally in the sum of \$40,000 but which has been reduced by payments to the sum of \$22,000 and accrued interest thereon. And the party of the first part covenants as follows- First-That the party of the first part is seized of the said premises in fee simple and has good right to convey the same-Second-That the party of the second part shall quietly enjoy the said premises-Third-That the said premises are free from incumbrances except as aforesaid-Fourth-That the party of the first part will execute or procure any further necessary assurance of the title to said premises-Fifth-That the party of the first part will forever warrant the title to said premises-In witness whereof the party of the first part will forever warrant the title to said premises-In witness whereof the party of the first part has caused its corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officer the day and year first above written--KOSLO REALTY CO INC-by- Samuel Boillin Secretary--(Seal Koslo Realty Co Inc incorporated-1924- New York) State of New York County of New York--ss- On the 15th day of July nineteen hundred and twenty-six before me came Samuel Boillin to me known who being by me duly sworn did depose and say that he resides in Borough of Bronx New York City that he is the secretary of Koslo Realty Co Inc. the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order-- Michael V Rosenberg--Ex Co No 28022 Term exp Nov 16/1928-Cert Filed Not subject to recording

Office Serial No-C-11875--Jens paid 6/2/80

This indenture made the 22nd day of June nineteen hundred and twenty-six between
KOSLO REALTY CO INC a domestic corporation having its principal place of business at
405 Lexington Avenue Borough of Manhattan City of New York party of the first
part and ROSENBLUM REALTY CORPORATION a domestic corporation having its principal
place of business at 1354 Fifth Avenue New York City party of the second part-

witnesseth that the party of the first part in consideration of One hundred (\$100.00) dollars lawful money of the United States and other valuable considerations paid by the party of the second part does hereby grant and release unto the party of the second part its successors and assigns forever--Parcel A--All that certain lot piece or parcel of land situate lying and being in the Borough of Bronx in the City County and State of New York which on a certain map entitled "Map of 108 lots belonging to the Hudson F. Rose Company known as the Coster Estate, situated in the Borough of Bronx New York City" surveyed by E.H. Holden C.E. City Surveyor New York May 25th, 1906 which map was filed as No-1115A, in the office of the Register of the County of New York on the 26th day of May A.D. 1906 is known and designated as and by the lot number One hundred and four (104) Parcel--B--All those certain lots pieces or parcels of land situate lying and being in the Borough of Bronx in the City County and State of New York which on a certain map entitled "Map of 108 lots belonging to the Hudson F. Rose Company known as the Coster Estate situated in the Borough of the Bronx New York City" surveyed by E.H. Holden C.E. City Surveyor N.Y. May 25th, 1906 which map was filed as No-1115A in the Office of the Register of the County of New York on the 26th day of May A.D. 1906 are known and designated as and by lot numbers One hundred and five (105) and one hundred and six (106)-Subject to any assessment and assessments which may have been placed or may have become liens against the above described premises on or after May 8th, 1926- Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises To have and to hold the premises herein granted unto the party of the second part its successors and assigns forever- And said Koele Realty Co. Inc covenants as follows- First-That said party of the first part seised of the said premises in fee simple and in good right to convey the same- Second-That the party of the second part shall quietly enjoy the said premises- Third-That the said premises are free from incumbrances-Fourth-That the party of the first part will execute or procure any further necessary assurance of the title to said premises-Fifth-That the said party of the first part will forever warrant the title to the said premises-In witness whereof the party of the first part has hereunto set its hand and seal the day and year first above written--Koele Realty Co. Inc- by Samuel Beilin -Pres(Said Koele Realty Co. Inc-incorporated 1924-New York) In presence of Martin W Frank-State of New York County of Bronx-- On the 22nd day of June

State of New York
County of New York

On the 22nd day of June
before me came Paul P. Gettinger,
did depose and say that he resides in City of New York,

nineteen hundred and twenty five
to me known, who, being by me duly sworn,

that he is the President

of 666 West End Avenue Corporation

the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal
affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors
of said corporation; and that he signed his name thereto by like order. Beattie Brandel Comm of Deeds, N Y City

N Y Co. No. 81, Reg. No. 27037, Kings Co. 22, Reg. No. 7020, Comm exp. Feb. 17, 1927

(Certificate filed Registers Office, New York County EF)

(Recording tax of \$ 206.00 Rec'd June 23, 1925 Serial No. T 13800 Annie M thews, Register
New York County)

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Indorsed to be indexed against Block Number 1240
Recorded preceding at the request of N Y Title & Mortgage Co. 135 B'way, N Y C. on the Land Map of the County of New York
at 35 Mins P.M. June 23, 1925 at 3 O'clock

EXAMINED

S.

REGISTER.

RW

erected. Said premises being also known as and by street Nos. 114-46 Nelson Avenue. Together with appurtenances and all estate and rights of party of first part in and to said premises. To have and to hold the premises herein granted unto party of second part its successors and assigns forever. Subject to any state of facts that an accurate survey would show. Subject to present leases, lettings and tenancies. Subject to first mortgage lien in the sum of \$120,000 and accrued interest thereon. Subject also to second mortgage lien originally in the sum of \$30,000 and which has been reduced by payments to the sum of \$18,000 and accrued interest thereon. And party of first part covenants as follows. First. That party of first part is seized of said premises in fee simple and has good right to convey same. Second. That party of second part shall quietly enjoy said premises. Third. That said premises are free from incumbrances, except as aforesaid. Fourth. That party of first part will execute or procure any further necessary assurance of title to said premises.

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Def't Ex. A

2. In purchase, lease, sale, exchange, or other disposition of real property, improved or unimproved, or any interest therein; in erecting, repairing, rebuilding or works of every description on the property, or upon any other property, or in any improvements existing on the property; in mortgage and other property interests in the property of the corporation or in any interest in the property of the corporation; in the purchase of securities on the open market and in the purchase of the securities of the corporation and to further

d. To manufacture, purchase or otherwise acquire, to hold, pledge, sell and deal in products, materials, goods, wares, merchandise, and personal property, accepting bills of exchange, of whatsoever kind, nature, variety or description; and to acquire, purchase, lease, construct or operate factories, warehouses and stores and other structures.

e. To buy, or otherwise acquire any invention, improvements, processes, trademarks and copyrights, and any letter patent, licenses, trade names of the United States or other countries, and to use, exercise, develop, sell and grant licenses and all rights in respect to the same or any of them.

f. To buy, lease or otherwise acquire the whole or any part of the business, good-will and assets of any firm or corporation (domestic or foreign), engaged in the same business of the same general character as that for which this corporation is organized.

g. To purchase, receive, hold and dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor, its stock or bonds or other obligations, and, as owner of any such stock, to possess and exercise in respect thereof all the rights, powers and privileges of the usual owners or holders thereof and to exercise any and all voting powers thereon.

h. To contract with and all of its business with any one or more of the cities and towns herein and there, in its purpose, in any of the cities, territories or counties of the United States, or in any foreign country, and the said corporation may hold, purchase, receive, convey or dispose of real or personal property (as aforesaid) of every kind, but only as well as in the City of New York; but the corporation shall not do any act or thing forbidden by law to a corporation organized under the Business Corporations Law of the State of New York.

ARTICLE II: The amount of the capital stock shall be one thousand (\$1,000,000) dollars, to consist of shares of the par value of one hundred dollars each, of which shares one hundred thousand shall be paid up.

ARTICLE III: The office of the corporation shall be in the Borough of Manhattan, City, County and State of New York.

ARTICLE IV: The location of the corporation shall be in the City of New York.

ARTICLE: The number of its directors shall be five (5).

ARTICLE: The names and post office addresses of the directors until the first annual meeting of the stockholders were:

NAME	POST OFFICE ADDRESS
CHARLES L. KENNEDY	Jamaica Avenue & 117th Street, Richmond Hill, New York City
ALFRED KATZMAN	6217 Broadway, Borough of Manhattan, New York City
FREDERICK C. GORDON	6217 Broadway, Borough of Manhattan, New York City
FRANK CONNELLEY	4406 Lexington Avenue, Borough of Manhattan, New York City
ROBERT A. SMITH	6217 Broadway, Borough of Manhattan, New York City

ARTICLE: The names and post office addresses of the subscribers of this certificate of incorporation and a statement of the number of shares which each agreed to take in the corporation are as follows:

NAME	POST OFFICE ADDRESS	NO. OF SHARES
JOHN A. SMITH	6217 Broadway, Manhattan, New York City	1
ALFRED KATZMAN	6217 Broadway, Manhattan, New York City	1
C. WILSON SMITH	6217 Broadway, Manhattan, New York City	1

he resides in Borough of Bronx New York City that he is the secretary of Kauls Realty Co Inc. the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order-- Michael V Rosenberg--BX Co. Reg. No-28022 Term exp Nov 16/1928-Gert Filed Not subject to recording NDA. Intended to be indexed against block number 2513 lot pt 56 on the land map of the county of Bronx. Recorded proceeding at request of Harrie Grossman Jul 29/1926 at 12 o'clock and 05 mins. P.M.

Examined--JP

Louis A Scheffel

Register--JP

12
to the said premises-In witness whereof the party of the first part has hereunto set
its hand and seal the day and year first above written--Kosle Realty Co. Inc- by
Samuel Beilin -Pres(Seal Kosle Realty Co. Inc-incorporated 1924-New York) In presence
of Martin W Frank-State of New York County of Bronx-- On the 22nd day of June
nineteen hundred and twenty-six before me came Samuel Beilin to me known who being
duly sworn did depose and say that he resides in the County of Bronx, that he is the
treasurer of the Kosle Realty Co Inc the corporation described in and which executed
the above instrument; that he knew the seal of said corporation; that the seal
affixed to said instrument was such corporate Seal; that it was so affixed by order
of the Board of Directors of said corporation and that he signed his name thereto by
like order- Louis Jay-Comm of Deeds Br Co Ck No-6-Reg Is-27006-Comm exp. Oct 6/1927
Cert Filed. Not subject to recording taxLH. Indorsed to be indorsed against block
number 5329 on the land map of the county of Bronx. Recorded proceeding at request of
Louis Jay-June 23/1926 at 12 o'clock and 10 mins P.M.

~~Samuel Beilin~~-27

Louis A Schoffel

Register--1P

19 JAN 46

... we have made and subscribed the
 certificate in triplicate this 26th day of January, 1946

[Signature]
[Signature]
[Signature]

On the 26th day of January, 1946, before me
 ... and ...
 to be known and known to me to be the individuals described
 ... the foregoing instrument, and they
 fully acknowledged to me that they executed the same

Nathan Herman

LIBER 19 PAGE 447

STATE OF NEW YORK—OFFICE OF THE SECRETARY OF STATE
CORPORATION BUREAU.

ALBANY, February 2, 1936

Received from BAYLON WATERFRONT, INC.Pay Minimum 1 Dollars,in payment of tax under section 180 of the Tax Law, as follows: $1/20$ of 1 per cent on\$ 5,000.00 consisting of 50 shares par value \$ 100.00 each, \$ 10.00Five cents per share on shares without par value, \$

FLORENCE E. S. KNAPP, Secretary of State.

by [Signature]

Cashier

FILED and RECORDED at request
 of James E. [Signature] 10 11
 at 5 o'clock 73 minutes PM

RECORDED

JAN 11 1956

FEB - 1956 00267 . . . - L K

CERTIFICATE OF INCORPORATION

-2-

SECTION EIGHT, INC.

Dated January 11, 1956

LOUIS H. PERL,
 Attorney & Counselor at Law,
 1111 Broadway,
 Manhattan,
 New York City 100

SUM NO. 3756
 PAGE NO. 1
 TOTAL PAGES 1

CLERK OF COURT
 DEC 17 1955

BY *E. J. Y.*

STUD NO. 6794
 PAGES 1
 TOTAL PAGES 1

FEB 8 - 1956

COUNTY CLERK

E. J. Y.

CELESTIAL 7:30 PM - 8:00 PM

54

THE TRIM BROS., INC.

Subject to Article IX of the Stock Corporation Law.

the undersigned, desiring to form a business corporation pursuant to the provisions of Article 31 of the Stock Corporation Law of the State of New York, do hereby make, sign, acknowledge, and file this Certificate for that purpose, and do hereby certify:

7235b The name of the proposed corporation is:

NEW RITE STORE, INC.

RECORD: The subject for which is in third year

3. To conduct and carry on business of dealing, in and with acquiring, improving, developing, holding, selling and conveying, managing, leasing and exploiting real property, including leaseholds and all interests in real estate for profit.

to conduct and carry on business of constructing and the improvement, renovation, improvement and development of real estate, including buildings and all interests in real estate and for

...and the party on business of acting as
...in particular the business
...or in the transaction of
...business.

to make money, exchange, profit or otherwise
for the purpose of and in furtherance of activities connected with, build-
ing up, carrying on, maintaining, and all other property of the company,
and to conduct the business thereof at the discretion and convenience
of the legal or available rights and interests therein.

8. To borrow money with or without pledge of, or mortgage on any or all of its real or personal property or securities as far as necessary for its business, loan or advance money upon or on personal or real property or on either of them and to purchase or dispose of mortgages upon real estate.

Said corporation shall have additional powers and everything necessary, suitable or proper for the accomplishment of purposes hereinbefore enumerated or any of them or any portion thereof principal, agents, contractor or otherwise, either alone or with other corporations or natural persons and shall possess and may exercise all rights, powers and privileges of natural persons in connection therewith subject to law and shall also have authority and power to purchase, sell and dispose of the assets, funds and other evidence of indebtedness of any corporation, domestic or foreign, and issue in exchange therefor its stocks, bonds or other obligations, within the limitations of the Business Corporation Law and any extension in respect thereto all powers and privileges of natural persons or bodies thereof, and may execute any contracts relating to stocks, bonds or other obligations of any corporation in furtherance of its business, and the same may be performed by corporations organized under the said Business Corporation Law. Said corporation shall also have the power to conduct its business or to exercise any part thereof in any place, territory, colony or other country or place and in the District of Columbia, or in any other country or place, as the board of directors may deem that the same may be performed by corporations organized under the Business Corporation Law of the State of New York.

Article 10. Name of the Corporation shall be the same as that of the

Article 11. The Corporation shall have the right to

Article 12. The Corporation shall have the right to

Article 13. The Corporation shall have the right to

Article. The Borough of Queens, City of New York, County

of New York is the City and County in which its principal

office is located.

Section. Its duration shall be perpetual.

Section. The number of its directors shall be seven

and it is hereby declared that the Directors are not required to be

Section. The name and post office addresses of the
 Directors shall be the first annual meeting of the stock-

THE DIRECTORS

11801 Ave. 2 189th St., St. Albans
 100 Madison Avenue, Jamaica, N.Y.
 10001 109th St. N. Y. C. 23-5117-1
 10001 109th St. N. Y. C. 23-5117-1
 10001 109th St. N. Y. C. 23-5117-1
 10001 109th St. N. Y. C. 23-5117-1
 10001 109th St. N. Y. C. 23-5117-1

Section. The name and post office addresses of the

Directors shall be the first annual meeting of the stock-

holders of this Corporation and a statement of the number of the shares

owned by each of them in the Corporation are as follows:-

THE STOCKHOLDERS

NAME

11801 Ave. 2 189th St., St. Albans (1)
 100 Madison Ave., Jamaica (2)
 10001 109th St., New York City (3)
 10001 109th St., New York City (4)
 10001 109th St., New York City (5)
 10001 109th St., New York City (6)
 10001 109th St., New York City (7)

Section. The names and addresses of the stockholders are

as follows:-

Section. The names and addresses of the stockholders are

as follows:-

Section. The names and addresses of the stockholders are

as follows:-

Section. The names and addresses of the stockholders are

as follows:-

Section. The names and addresses of the stockholders are

as follows:-

prevent his contracting with the corporation for the benefit of himself or any firm, association or corporation in which he may be in any way interested

(b) All corporate powers, including the sale, mortgage and pledge of the whole or any part of the corporate property shall be exercised by the Board of Directors, except as otherwise expressly provided by law.

(c) The corporation may use and apply its surplus earnings and accumulated profits, otherwise by law to be reserved, to the purchase or acquisition of property and to the purchase or acquisition of its own capital stock from time to time and to such extent and in such manner as may be determined by its Board of Directors shall determine whether the property nor the capital stock so purchased or acquired or any of its own capital stock taken in payment or satisfaction of any debt due to the corporation shall be regarded as profits for the purpose of declaration or payment of dividends unless otherwise determined by a majority of the Board of Directors.

IN WITNESS WHEREOF, we have hereunto set our hands and acknowledged this Certificate of Incorporation in duplicate this 1st day of July, 1928.

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer

Edwin H. Cramer

Frank C. Cramer



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2857.113.

STATE OF NEW YORK)

CITY OF NEW YORK)

COUNTY OF JERSEY)

On the 17th day of July, 1926, before me personally came

FRANK C. TOMSON, FREDERAL J. MORROW and EDWARD W. HILL, to be known and
 C. HUNTER CAMPBELL, ARTHUR J. HILL, FRANK MORROW, EDWARD W. HILL,
 known to me to be the individuals described in and who executed the fore-
 going Certificate of Incorporation and they duly acknowledged to me that
 they executed the same.

Yonah P. Blumenthal
Notary Public - Jersey City
 #4661 - Exp. Jan. 1927

State of New York
 DEPARTMENT OF STATE

I CERTIFY That I have compared the preceding copy with the original

State of Incorporation of

THE WHITE WAVE, INC.

In this department on the 28th day of July, 1926, and that such
 is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State at
 the City of Albany, this 28th day of July, 1926, at
 of one thousand four hundred
 and

[fol. 245]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 58—October Term, 1959.

Argued November 17, 1959

Docket No. 25690

UNITED STATES OF AMERICA, Appellee,

—v.—

FRANK COSTELLO, Appellant.

Before: Magruder, Moore and Friendly, Circuit Judges.

Appeal from a decree of the United States District Court for the Southern District of New York, Archie Owen Dawson, *Judge*, revoking citizenship, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1451(a), as amended, 68 Stat. 1232, on the ground that citizenship certificate was obtained by willful misrepresentations. 171 F. Supp. 10. *Affirmed*.

[fol. 246] Edward Bennett Williams, Washington, D. C. (Agnes A. Neill and Vincent J. Fuller, Washington, D. C., Morris Shilensky, New York, N. Y., and Hays, St. John, Abramson & Heilbron, New York, N. Y., on the brief), for appellant.

Morton S. Robson, Asst. U. S. Atty., Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Atty., S. D. N. Y., New York, N. Y., on the brief), for appellee.

OPINION—February 17, 1960

Magruder, Circuit Judge:

This is another of those troublesome denaturalization cases, instituted by the government in an effort to have

the court cancel a certificate of naturalization issued over thirty years ago. The proceeding is brought pursuant to §340(a) of the Immigration and Nationality Act of 1952, as amended, 68 Stat. 1232. This statute contains no provision for limitations, nor is there any other federal statute applicable to the case. And, as Hughes, C.J., said in *United States v. Summerlin*, 310 U. S. 414, 416 (1940): "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."

It is impossible to say that the statutory provisions for the issuance by the court of naturalization certificates, under certain prescribed conditions, do not constitute a proper judicial function. *Tutup v. United States*, 270 U. S. 568 (1926). And despite what may seem to be the harshness of the result, it seems impossible to say that the Congress cannot constitutionally provide a proceeding for the cancellation of a certificate obtained by fraud or concealment. *Knauer v. United States*, 328 U. S. 654, 673 (1946). It was so provided way back in the Act of 1906 which, in §15 thereof, vested jurisdiction in the district courts of suits by the United States Attorney on behalf of the United States "for the purpose of setting aside and canceling a certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." 34 Stat. 601. See *Johannessen v. United States*, 225 U. S. 227 (1912). Such provision for denaturalization was carried forward by Congress into §338(a) of the Nationality Act of 1940 (54 Stat. 1158-59). In the Immigration and Nationality Act passed in 1952, denaturalization proceedings were also provided for, but the Congress struck out the earlier provision for cancellation of a certificate that had been illegally issued, and confined cancellation to cases where the certificate had been procured "by concealment of a material fact or by willful misrepresentation." 66 Stat. 260. This provision was reenacted by the Congress in 1954. 68 Stat. 1232.

The Supreme Court has never told us that a denaturalization proceeding partakes of the character of a criminal proceeding. Indeed, in the *Johannessen* case, *supra*, the Court upheld the constitutional validity of a provision in

§15 of the Act of 1906 to the effect that the denaturalization provisions should apply not only prospectively but also "to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws." 34 Stat. 601. In this connection the Court said (225 U. S. at 242): "It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. . . . The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."

[fol. 248] Although the Supreme Court has many times upheld a decree for the cancellation of a certificate of naturalization, it has prescribed an exacting quantum of proof as requisite to establishing a case by the government against a certificate holder. The case for cancellation must be "clear, unequivocal, and convincing," and should not leave "the issue in doubt." See *Schneiderman v. United States*, 320 U. S. 118, 158 (1943); *Baumgartner v. United States*, 322 U. S. 665 (1944); *Knauer v. United States*, *supra*, 328 U. S. 654 (1946).

If a denaturalization case is a sort of civil proceeding, we are at a loss to see why our scope of review is not limited by the "clearly erroneous" test of the unqualified Rule 52(a) of the Federal Rules of Civil Procedure. If that is so, then once we are convinced that the district court was aware of and applied the proper strict standards of proof—which clearly appears in the case at bar—we ought not to upset its finding that the defendant had obtained his certificate of citizenship by fraud unless we are satisfied that such finding was "clearly erroneous." See *Corrado v. United States*, 227 F. 2d 780, 783 (C. A. 6th, 1955). Of course, fraud is an internal state of mind, and it is possible that a man may give an incorrect answer to a question in a bona fide but mistaken belief as to what the question calls for. But if an applicant for citizenship has in fact no such misapprehension as to what answer the question calls for, and consciously falsifies an answer on a material point, he is certainly guilty of fraud in the baldest sense of the

term. The district court believed that Costello was guilty of this kind of fraud, and we certainly cannot say that the finding to this effect was "clearly erroneous."

On the other hand, perhaps we are wrong about our limited scope of review; and it may be that in this very special type of civil proceeding we have a broader power of review, and are under the obligation ourselves to scrutinize [fol. 249] the evidence, to satisfy ourselves that the proof offered by the government was "clear, unequivocal, and convincing." See *Baumgartner v. United States*, *supra*, 322 U. S. 665, 670-72 (1944); *Brenci v. United States*, 175 F. 2d 90 (C. A. 1st, 1949); *Cufari v. United States*, 217 F. 2d 404 (C. A. 1st, 1954).

Fortunately, we do not in this case have to determine what our scope of review may be in these cases, since we are here more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof. 171 F. Supp. 10.

We think the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand and to introduce no evidence in answer to the government's case indicating fraud. The matters inquired into were within Costello's peculiar knowledge. Since Costello was not a criminal defendant in the present proceedings, he had no privilege to remain silent. *United States v. Matles*, 247 F. 2d 378 (C. A. 2d, 1957), *rev'd* on other grounds 356 U. S. 256 (1958). See also *Vajtauer v. Commissioner*, 273 U. S. 103 (1927).

The government's complaint in the present case was filed May 1, 1958. In compliance with the procedural requirement of §340(a), as amended, the complaint was accompanied by affidavits showing "good cause" for the institution of the proceeding. 68 Stat. 1232. The request for cancellation of the certificate of naturalization was based upon various allegations of fraud and concealment. We mean to be guided by the words of the Supreme Court in the *Schneiderman* case, *supra*, 320 U. S. at 16. "A denaturalization suit is not a criminal proceeding. But neither

is it an ordinary civil action since it involves an important [fol. 250] adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

Some of the allegations of fact contained in the complaint were not accepted by the district court as sufficiently established pursuant to the strict requirements of proof imposed upon the government. Though the government now urges us to examine the state of the evidence in these regards, we do not propose to go beyond the findings of fact by the district court. That court based its decree upon findings with reference to two of the issues raised by the complaint: (1) That in the preliminary form for petition for naturalization, and in testimony under oath before a naturalization examiner, and also in his petition for naturalization, Costello knowingly and willfully stated that his occupation was "real estate," whereas in truth his occupation was the illicit purchase and sale of alcoholic beverages; (2) that the defendant swore in his oath of allegiance, on September 10, 1925, that "I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same." This was said to be a known falsehood because the defendant was actually engaged at the time in a course of activity which flouted the Constitution and was designed to violate the laws of the United States.

It was established by the United States, from Costello's own mouth, that he was at the crucial dates engaged in bootlegging activities. He gave a statement to Special Agent Sullivan on July 24, 1938, to the effect that he was involved in the liquor business from 1923 or 1924 until a year or two before repeal of the Eighteenth Amendment. In answer to questions by the district attorney in a proceeding before a New York County grand jury in 1943, Costello admitted that he got large sums of money from importing whisky during prohibition days. He admitted [fol. 251] that he had reported to the state taxing authorities that for the years 1919 to 1932 his income had totaled \$305,000, most of it made in the bootlegging business. If corroboration of these statements is required in the present case, such corroboration is amply found in the testimony of

the witnesses Kessler, Kelly and Coffey. The evidence is clear beyond any doubt that during prohibition days Costello's major activity, both in terms of time spent and revenue obtained, was bootlegging.

In his preliminary form for petition for naturalization, in answer to a question requiring him to put down his "present occupation," he answered "real estate." He gave a similar answer in his petition for naturalization.

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. The government made a check of the real estate records in four counties of Greater New York, which check revealed that Koslo Realty Co., Inc., was organized on December 1, 1924; that some time prior to May 1, 1925, Costello was associated with this corporation. Koslo Realty Co. purchased a piece of property and sold the same on June 22, 1925. Costello later became president of the corporation. How much activity Costello had to expend in this capacity does not appear, nor does it appear whether or not Koslo Realty Co. was engaged in other real estate transactions in other parts of the country not covered by the government's spot check. If there was any further evidence along this line, it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but [fol. 252] "dust in the eyes" to conceal his real occupation. As the district judge stated: "If a man in that situation had been honest when asked what his occupation was, would he have answered 'real estate'? If he had told the truth he probably would not have been naturalized, but this is no excuse for his using fraud and deceit to secure his naturalization." The term "occupation," the court said, "would commonly be understood to refer to income producing activity to which a person devotes the major portion of his time and from which he derives the greater portion of his income." 171 F. Supp. at 18. Surely it is conceivable that an applicant

might believe that the answer called for no more than a disclosure of some "legal occupation." There is no evidence in the record that Costello so believed. If he had given a truthful answer, it is probable that the court would not readily have accepted his assertion of being possessed of "good moral character," and he might not have received his certificate of naturalization. As the district court said: "When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaged in a willful misrepresentation in order to secure his naturalization certificate." 171 F. Supp. at 18.

The district court also based its holding upon a finding that Costello falsely swore that he would "support and defend the Constitution" and "bear true faith and allegiance to the same."

Costello also swore that he was "attached to the principles of the Constitution." Just what this phrase might mean as used in the Nationality Act poses a question of some difficulty. See *Stasiukevich v. Nicolls*, 168 F. 2d 474, 477 (C. A. 1st, 1948). We don't believe that the phrase would require a person to believe in the soundness of the Eighteenth Amendment; but at least it would seem to require that the applicant should support an existing provision of the Constitution unless and until it is repealed [fol. 253] in an orderly way as provided in Art. V of the Constitution. Therefore, if Costello was at the time engaged in violation of the Eighteenth Amendment and of the Volstead Law, it seems hard to say that he was "attached to the principles of the Constitution."

But the answer to all the foregoing is that the complaint in the present case does not charge that Costello swore falsely in affirming that he was "attached to the principles of the Constitution."

We are not satisfied that the district court was correct in ruling that the oath to "support and defend the Constitution and laws of the United States" means the same as "attached to the principles of the Constitution." It may be urged that the oath which Costello was charged with having violated was merely a political oath calling for a repudiation of allegiance to King Victor Emmanuel III and a statement of allegiance to the United States.

We do not have to pass finally on this alleged fraud in the oath, since the first allegation, with reference to the statement of Costello's occupation, is amply supported so as to sustain the charge of fraud and to require us to uphold the decree of denaturalization.

There is only one further point made by appellant that deserves some extended comment. It has to do with the validity of the affirmative defense, specifically pleaded here, that "the complaint is barred under principles of *res judicata*." We think there is nothing to the point; in fact, we cannot see how any court could accept the argument advanced by appellant except upon an invincible determination to frustrate finally what the court might regard as an undesirable effort by the government to accomplish the cancellation of an old certificate of naturalization.

This is not the first effort by the government to obtain the cancellation of Costello's certificate. On October 22, 1952, the district attorney filed a denaturalization complaint [fol. 254] against Costello under §338 of the Nationality Act of 1940 (54 Stat. 1158). The allegations of fraud were about the same as in the present complaint. But as then permitted by law, cancellation of the certificate of naturalization was also sought on the ground that the certificate was "illegally procured"; that is to say, that the conditions precedent to naturalization, a "good moral character" and an attachment "to the principles of the Constitution," did not in fact exist. As we have previously stated, the latter ground of cancellation was omitted from the present Act.

Though the United States Attorney filed an affidavit of "good cause" prior to the trial of that earlier action, he failed to submit this affidavit simultaneously with the filing of the complaint. The district court entered an order dismissing the complaint "without prejudice." 145 F. Supp. 892 (S. D. N. Y. 1956). The court of appeals reversed, in an opinion having to do solely with so-called "wire tap" evidence. *United States v. Costello*, 247 F. 2d 384 (C. A. 2d, 1957). Upon certiorari the Supreme Court, in a one-paragraph *per curiam* opinion, reversed the judgment of the court of appeals upon a ground not theretofore considered by that court, namely, that an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings and must be filed along with the com-

plaint when the proceedings are instituted, citing only *United States v. Zucca*, 351 U. S. 91 (1956). Accordingly the Supreme Court remanded the case to the district court with directions to dismiss the complaint. 356 U. S. 256 (1958).

When the case got back to the district court, since nothing was said in the Supreme Court mandate about whether the dismissal should be with or without prejudice, the district judge considered that he was bound by the terms of the mandate merely to dismiss the complaint.

[fol. 255] There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In Rule 41(b) of the Federal Rules of Civil Procedure, it is provided as follows: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 41(b) does not state what the effect of a prior judgment on the merits is, but if the dismissal of the earlier complaint was really a judgment on the merits we suppose that that would preclude the government as well as a private litigant from filing another complaint based upon the same cause of action, under principles of *res judicata*.

The district court was persuaded by the government's argument that Rule 41(b) had no application because the dismissal was "for lack of jurisdiction" within the meaning of the rule.

No doubt the word "jurisdiction" is a somewhat slippery one, susceptible of various meanings. In holding, as we do, that Rule 41(b) has no application, we prefer not to say that the district court lacked "jurisdiction" to determine the denaturalization complaint despite the lack of a "procedural prerequisite," namely, the filing of an affidavit showing "good cause" simultaneously with the filing of the complaint. Because the phrase "lack of jurisdiction" is

used in immediate conjunction with the phrase "for improper venue," it would be plausible to argue that the word "jurisdiction" is used in the rule in its usual re-[fol. 256] stricted sense. See *Title v. United States*, 263 F. 2d 28 (C. A. 9th, 1959).

In striking out the words "without prejudice," as proposed by the government, the district court exercised no discretion, as contemplated in the rule, but merely conceived that it was bound by the mandate of the Supreme Court to dismiss the complaint without saying anything about whether it should be with or without prejudice.

The district court did not determine that its dismissal should be regarded as a judgment on the merits. It made no findings as provided in the sentence of Rule 41(b) saying that, "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." And it is obvious that the Supreme Court, in directing such dismissal, did not suppose that it was directing a determination on the merits, which would preclude the government from starting over again, with this particular statutory "procedural prerequisite" duly observed. In the only case cited by the Supreme Court in its brief *per curiam* opinion, *United States v. Zucca*, *supra*, 351 U. S. 91 (1956), the district court had dismissed a complaint for denaturalization, without prejudice to the government's right to institute an action to denaturalize the respondent upon filing an affidavit of good cause. 125 F. Supp. 551 (S. D. N. Y. 1954). The court of appeals affirmed the dismissal (221 F. 2d 805 (C. A. 2d, 1955)) and upon certiorari the Supreme Court in its turn affirmed the judgment of the court of appeals. 351 U. S. 91 (1956). The Supreme Court thought that the district court had correctly dismissed the proceedings because of the failure of the government to file the required affidavit at the time the complaint was filed. But note, that such dismissal had been without prejudice.

[fol. 257] It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be inter-

preted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. And see *Restatement, Judgments* §49 (1942).

A judgment will be entered affirming the judgment of the district court.

[fol. 259]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present:

Hon. Calvert Magruder, Hon. Leonard P. Moore, Hon.
Henry J. Friendly, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

—v.—

FRANK COSTELLO, Defendant-Appellant.

JUDGMENT—February 17, 1960

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 260] [File endorsement omitted]

[fol. 261] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 262]

SUPREME COURT OF THE UNITED STATES

No. 802—October Term, 1959

FRANK COSIELLO, Petitioner,

—v.—

UNITED STATES.

ORDER ALLOWING CERTIORARI—May 16, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. Two hours are allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

**SUPPLEMENTAL
TRANSCRIPT OF RECORD**

Supreme Court of the United States

OCTOBER TERM 1960

No. 59

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED MARCH 18, 1960

CERTIORARI GRANTED MAY 16, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 59

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. A] —

A

No. 494—O. T. 1957

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 24470—October Term, 1956

UNITED STATES OF AMERICA, Appellant,

—against—

FRANK COSTELLO, Appellee.

Appellant's Appendix—Filed February 21, 1957
Volume I

PAUL W. WILLIAMS,
United States Attorney for the
Southern District of New York,
Attorney for United States of America,
Appellant.

EDWIN J. WESELY,
CAROLD J. RABY,
Assistant United States Attorneys,
Of Counsel



[fol. 257] [folios 116a through 284a of original record]

Government's Exhibit No. 3

TESTIMONY OF FRANK COSTELLO BEFORE THE SECOND
SEPTEMBER 1943 GRAND JURY, NEW YORK COUNTY

People v. John Doe

October 13, 1943

FRANK COSTELLO, 115 Central Park West, Borough of
Manhattan, City of New York, called as a witness, having
been first duly sworn, testified as follows:

By Mr. Hogan:

Q. Now, Mr. Costello, I have not asked you to sign a
waiver of immunity, but have you spoken to your lawyer
about that?

A. Yes, sir.

Q. And on his advice, what do you propose to do with
respect to that?

A. I am not signing any waiver of immunity.

Q. You know this is a grand jury of New York County.
My name is Hogan. I'm going to ask you some questions
and Mr. Gelb, who is associated with me, will want to ask
you some questions, and you understand the significance
of the oath you have taken, don't you?

A. Yes, sir.

Q. You have appeared before grand juries before,
haven't you?

A. Yes, sir.

Q. And is it your intention to answer truthfully the
questions I'm going to ask you?

A. Yes, sir.

Q. And your lawyer has advised you as to the sig-
nificance of making false statements in a grand jury room?

A. Yes, sir.

[fol. 258] Q. Now, will you tell us how long you have
known Congressman James Fay?

A. Well, I would say about eight or ten years.

Q. And how did you meet him, Mr. Costello?

A. I believe I met him through Kenneally.

Q. Was Mr. Fay in the Internal Revenue office at that time?

A. No, sir.

Q. He did go in there afterwards?

A. Afterwards.

Q. At that time he held no political office, is that true?

A. No, sir.

Q. And did you have any dealings with him after he became the Chief Field Deputy in the Internal Revenue office?

A. No, sir.

Q. Did you ever turn any money over to him?

A. No, sir.

Q. Did you ever lend him any money?

A. No, sir.

Q. Did you ever give him any money in his capacity as an agent of the Internal Revenue Bureau?

A. No, sir.

Q. Do you hold a receipt signed by him for seven or eight thousand dollars?

A. No, sir.

Q. Now, Mr. Costello, won't you please be frank with us about that receipt because you can see that I have some information.

A. Let me explain it my way, Mr. Hogan.

Q. Sure.

A. Now, when you asked me if I hold his receipts, I don't believe I do, that is, not to my recollection. I have had receipts for paying Mr. Fay's office in my income tax, a monthly receipt, and I never took notice if it's his personal receipt.

Q. Do you still have those?

A. Well, I don't know if I have them or not.

Q. Do you recall whether one was in the amount of seven or eight thousand dollars?

A. No, sir.

[fol. 259] Q. Isn't it true that some years ago you settled a tax controversy by paying a lump sum?

A. Yes, sir.

Q. That was before or after the difficulty in New Orleans?

A. Much before.

Q. And didn't you talk to Fay in connection with that?

A. I believe I did. I made a settlement.

Q. With him?

A. That is right.

Q. Isn't it true that you were questioned thereafter about that settlement? Didn't government officials question you about that settlement?

A. No, I was never questioned.

Q. Did Mr. Fay ever speak to you about it after that?

A. Do you mean after I made the settlement?

Q. Yes.

A. After I made the settlement, I believe I spoke to one of McQuillan's men on the subject.

Q. Do you recall his name? Was it Mr. Ronane?

A. Mr. Ronane, right.

Q. What did you tell him?

A. I believe that he examined me on the moneys that I owed the government, being I had made certain arrangements to pay monthly.

Q. Did he tell you that the money you had given to Fay's office had not been credited to your account?

A. No, sir.

Q. What was his reason for questioning you about this money?

A. Well, I presume they wanted to collect a lump sum instead of the monthly payment.

Q. Wasn't it suggested to you at that time all that money had not been turned in? A. No, not at that time, no, sir.

Q. Did you ever hear from anybody that some of the money you paid for income tax had not been turned into the government?

A. Later, much later.

[fol. 260] Q. Whom did you hear that from?

A. Mr. Ronane.

Q. In what amount?

A. In the amount of about seven thousand dollars.

Q. And Mr. Ronane told you that that was money that had been received by Fay's office?

A. No, he told me if I had any doubt in my payments—if I got credited for all my payments. I told him I had no doubt, I got credited for all the payments.

Q. Did you show Mr. Ronane the receipt at the time?

A. At that time I did not have the receipt.

Q. Did you speak to Fay about it?

A. No.

Q. Now, so that, you have been friendly with Fay for a number of years?

A. That is right.

Q. Now, you recall that Congressman Sullivan was the leader of Tammany Hall until early in 1942?

A. Yes, sir.

Q. And that in February of that year, he was removed and a new leader was not selected until April of 1942. Now, isn't it true, Mr. Costello, that you were active in your friend Fay's behalf between February and April?

A. To some extent.

Q. As a matter of fact, do you recall speaking to Assemblyman Patrick Sullivan at your apartment house?

A. Yes, sir.

Q. And do you remember asking him to support Mr. Fay?

A. Mr. Fay or Dan Finn.

Q. Or Dan Finn. Will you give us the names of the other leaders with whom you spoke on behalf of Fay at that period?

A. Well, I spoke to Dr. Sarubbi, I spoke to Clarence Neal—

[fol. 261] Q. Yes.

A. I spoke to Jimmy Kelly. I believe that is all I spoke to.

Q. How about Mr. Neustein?

A. No, sir.

Q. You know him?

A. Yes.

Q. But you did not speak to him about him at this time?

A. No, I didn't know him at the time.

Q. You didn't know him at that time?

A. No, sir.

Q. How about Rosenthal?

A. To my recollection, I don't believe I spoke to him. I might have.

Q. It is possible?

A. It is possible.

Q. May we put it this way: If you had met him you probably would have spoken to him?

A. That is right.

Q. And Stand—did you talk to Stand?

A. No.

Q. Bert Stand?

A. No.

Q. How about his leader, Ahearn? Did you talk to him?

A. No.

Q. Testimony has been that Sullivan indicated to you that he would not support Fay. Is that your recollection of it?

A. That is right.

Q. On the other hand, Neal and Sarubbi and Kelly told you that they would support him?

A. That is right.

Q. How long have you known Neal?

A. Oh, about over twenty years.

Q. You and he were brought up in the same section of the City?

A. Well, yes.

Q. East Harlem?

A. Yes.

Q. And how long have you known Dr. Sarubbi?

A. Oh, I should say about five or six years.

Q. You have been to his home and visited him?

A. Just once.

[fol. 262] Q. And do you know Mrs. Sarubbi?

A. I never met Mrs. Sarubbi.

Q. And Di Salvio—how long do you know Mr. Di Salvio?

A. About twenty years also, or better.

Q. Now, was it your idea that Fay should run for the leadership? Or did he have that notion himself?

A. Fay did not ask me to support him.

Q. But you told him what you were doing, of course?

A. Clarence Neal asked me—that he was for Fay—and asked me to help.

Q. Enlisted your support?

A. That is right.

Q. But you told your friend, Fay, that you were active in his behalf?

A. Yes.

Q. And he was appreciative. He appreciated what you were doing?

A. Well, naturally.

Q. And you met from time to time to discuss his chances?

A. No, I don't believe I met him, but maybe once.

Q. During this period?

A. During the period.

Q. Now, there has been some testimony, Mr. Costello, that during this period of a month or two that there were meetings at the Waldorf and the testimony is that the meetings were with you and Neal and Stand, and possibly Sarubbi—I don't know that Fay's name was mentioned—but did you meet Neal and Stand during this period at the Waldorf? A. Well, I have met Neal very often because he shaves in the same barber shop. There is a restaurant where I used to have my lunch and it was just a casual meeting, not pre-arranged.

Q. Were others there with Neal?

A. I believe Fay had lunch there maybe once or twice.

[fol. 263] Q. And you would talk about politics? A. Not exactly. Just talk in general.

Q. But you would not avoid the discussion of politics?

A. No.

Q. And you made no secret of the fact that you were supporting Fay?

A. That is right.

Q. Now, when did you meet Mr. Kennedy?

A. Well, I know Mr. Kennedy about ten, twelve years.

Q. And do you recall how you met him?

A. The first time I met him I believe was at the race track.

Q. Yes. Who introduced you, do you remember?

A. Mr. Dooling. Jim Dooling.

Q. Jim Dooling?

A. Yes.

Q. And he was leader of Tammany Hall at one time also?

A. That is right.

Q. And you have seen him frequently since then?

A. Mr. Kennedy?

Q. Yes.

A. Well, yes, I have seen him quite often.

Q. You would see him at the race tracks?

A. Yes.

Q. And see him in restaurants?

A. Restaurants.

Q. You have had dinner with him, I suppose, from time to time?

A. Well, not time to time. I don't believe I ever had dinner with him.

Q. Would you meet him with Dooling? He was very close to Dooling.

A. At the time?

Q. Over the years, I mean.

A. Over the years, yes.

Q. But you would see him at Saratoga?

A. I don't believe I saw him in Saratoga.

Q. Did you ever have dinner with Dooling and him at any time?

A. No.

[fol. 264] Q. Who else would have dinner with Kennedy?

A. I don't believe I ever had dinner. I might have had a luncheon, I might have, but I just don't recollect having dinner with him.

Q. That you would say is about ten or twelve years ago?

A. Yes.

Q. I think Dooling was leader about 1934 or 1935.

A. Yes.

Q. So that you knew him and knew him as a friend long before he ever became leader?

A. Oh, yes.

Q. And you called him "Mike" or "Congressman"?

A. I called him "Congressman"—I called him "Mike" and when he became a Congressman I called him "Congressman."

Q. What did he call you?

A. Frank.

Q. Now, when did you have your first conversation with Kennedy with respect to the leadership?

A. Well, I just don't remember the dates but I know it was quite long before the leadership.

Q. Long before he was elected?

A. That is right—maybe a month or so before.

Q. Somewhere in the intervening period?

A. That's right.

Q. And where did you meet him at that time?

A. I believe I met him at the Madison Hotel.

Q. In the evening or at lunch?

A. At lunch in the diningroom.

Q. Was it a chance meeting?

A. It was a chance meeting. I invited him for lunch.

Q. Was anybody else present at the lunch?

A. Not that I remember.

[fol. 265] Q. And what was the conversation, to the best of your recollection?

A. His conversation was that he was a candidate, and he said to me "Can you do me any good?" I said, "In what respect?" He said, "Well, I know you know a few leaders. Maybe you can talk to them." Prior to that I had already promised Neal that I would help Fay. So I told him the truth. I said, "I am sorry, but if I can lend any help, I made a commitment with Fay through Neal."

Q. Did you give him to understand, Mr. Costello, that in the event your first commitment was no longer operative you might support him?

A. Yes, sir.

Q. Now, did there come a time before Kennedy was elected when Fay's chances dimmed out?

A. Well, no.

Q. He was a candidate right up to the end?

A. Not to my knowledge, not until the first few days before election, we would call it.

Q. Did Fay release you at any time?

A. Well, I made that—I specified in advance to Fay and Neal—I said, "Now if I can get you a few votes, if it don't do you fellows any good, I would like to see Kennedy get it."

Q. And do you remember where that conversation was when you told Fay and Neal?

A. Well, I didn't tell Fay, but I told Mr. Neal; and I believe it was at the Waldorf Barbershop.

Q. And then you say two or three days before Kennedy was elected it became apparent that Fay no longer had any chance?

A. I imagine the day before or so.

Q. And did you meet with Kennedy and the others at that time and tell them that you were turning your support over to Kennedy?

A. No, sir.

Q. You know the owner of Hogan's Irish House—Johnnie Hogan?

A. No, sir.

[fol. 266] Q. Didn't you meet—let me be specific, if I can—didn't you meet the day before Kennedy was elected at the Park Central Hotel?

A. No, sir.

Q. Did you hear of such a meeting?

A. No.

Q. You never heard of such a meeting at which it was finally decided that Kennedy was to be the leader?

A. No, sir.

Q. Well, who told you that Fay was no longer a candidate? Did Fay tell you that himself?

A. No, Fay never told me that.

Q. How did you know that it was time to release those leaders that had agreed to support Fay?

A. I never knew it until the following day of the election.

Q. Didn't you tell Sarubbi and these others that you no longer expected them to vote for Fay?

A. I told them to go along with Neal, if it is not Fay and if Neal goes with Kennedy, "you fellows go along with him".

Q. Neal was the one who was to do the deciding, as he attended these meetings?

A. Yes.

Q. And he would tell you when he met you at the barbershop how things were going?

A. That's right.

Q. Now, you saw Kennedy from time to time during this period, too?

A. Well, I have seen him a few times, yes.

Q. Did you refer to the discussion at the Madison Hotel?

A. Yes.

Q. This is before he was leader?

A. Yes.

Q. What would you say?

A. I told him—as I told him in the hotel.

Q. There was nothing new you repeated?

A. "My first choice is Fay".

[fol. 267] Q. And he said, "things are looking up to me, Frank, and maybe your second choice will win"?

A. And if Fay has no chance Neal will go for you and so will the leaders I had spoken to.

Q. Yes. Now did you attend at the Commodore or the Biltmore Hotel, I don't know just which one, on the day on which Kennedy was elected leader?

A. No.

Q. Do you remember being present at any pre-election celebration there?

A. No, sir.

Q. There was a beefsteak held at the New York Athletic Club after he was elected leader. Were you present at that?

A. No.

Q. Did you see Kennedy shortly after he was elected leader?

A. Yes.

Q. You congratulated him?

A. That is right.

Q. He thanked you?

A. That is right.

Q. Do you remember where that meeting was?

A. I just couldn't remember.

Q. It might have been one of a dozen places.

A. One of a dozen places, right.

Q. And you saw him frequently after his election as leader?

A. Well, not too frequently, maybe once a week or so. I would run into him.

Q. And sometimes appointments were made?

A. Sometimes, yes.

Q. Now, do you recall that you visited Tammany Hall in June of 1942? Do you remember Clarence Neal and Bert Stand showing you through there, meeting the telephone operator?

A. I believe I do, yes.

Q. Was that at Kennedy's invitation?

A. No, sir.

Q. Whose?

A. I had an appointment. I wanted to see Clarence Neal.

[fol. 268] Q. Yes.

A. In fact, we had a luncheon appointment and he said he's going to be in Tammany Hall and I said I would drop up and we will leave together.

Q. Were there some other people with you?

A. No.

Q. And you were shown through the place?

A. Yes.

Q. Had you been in there before?

A. No, sir.

Q. Have you been since?

A. No.

Q. Just one visit?

A. Just one visit.

Q. Now, Kennedy had your private telephone number?

A. Yes.

Q. You gave him that, when?

A. Oh, I gave it to him before he was leader.

Q. Before he was leader?

A. Yes.

Q. How did you happen to give him that?

A. Naturally the man wanted my support and he said, "Give me your telephone number in case I want to call you." I gave him my number.

Q. And did he call you from time to time and ask you whether there was any change?

A. Very seldom, but I believe he did call me a few times.

Q. And he has been at your home, has he not?

A. He has been at my home, yes.

Q. How many times would you say?

A. I would say about a few times.

Q. Do you know whether he was at your home before he was made leader?

A. He was at my home, yes.

Q. Can you recall that?

A. Well, I can recall he has been at my home.

Q. I mean the circumstances, Mr. Costello, in connection with a party or something? A. No, no party—in connection with his chances of my support.

[fol. 269] Q. This is before he was elected leader?

A. That's right.

Q. Did he come with Neal?

A. No, I believe he was alone.

Q. You have no doubt about that? He was at your home?

A. Yes, he was.

Q. Was anybody else present when he got there?

A. I believe Mrs. Costello might have been present.

Q. And of course he came to your home after he was elected leader?

A. Yes.

Q. Did you visit his office?

A. Yes.

Q. In the General Motors building?

A. Yes.

Q. How many times would you say you were there? A. Oh, I would say about twice.

Q. Not more than that?

A. No.

Q. Were they special occasions, Mr. Costello?

A. No.

Q. Have you been to his place at Peekskill?

A. No.

Q. Has he been to your place at Southold?

A. No.

Q. You have been to visit him at the New York Athletic Club?

A. No.

Q. Have you been to his home.

A. No.

Q. You have seen him at the Madison Hotel?

A. Yes.

Q. Have you seen him at the Essex House?

A. No.

Q. Let me refresh your recollection, did you meet him at the Essex House lobby on one occasion?

A. I believe I did, one occasion, yes.

Q. At the Madison Hotel how many times would you say you saw him there?

A. Oh, just a couple of times.

Q. And of course at the Waldorf, you have seen him there?

A. I saw him at the Waldorf.

[fol. 270] Q. A couple of times?

A. That's right.

Q. Now, do you recall that he visited New Orleans last winter?

A. Yes.

Q. And he told you he was going down there?

A. No, he didn't tell me he was going down there.

Q. Didn't you know that he was going?

A. No, sir.

Q. Didn't you tell your associate Mr. Kastel, that Kennedy was in New Orleans?

A. No, sir.

Q. You know that Mr. Kastel saw him there?

A. Well, now, can I tell it my way?

Q. Sure.

A. If I am not mistaken, he was in Florida at the time. From Florida he went to New Orleans and then when he got to New Orleans, then I knew, through one of the leaders, I imagine it was through Bert Stand or somebody,—he is not a leader, he is secretary—Clarence Neal or Bert Stand—that he was in New Orleans, and then I notified my associate Kastel that Mike Kennedy was in New Orleans with his Missus and “show him around.”

Q. Then Kastel did see him in New Orleans?

A. Had dinner with him.

Q. Do you know if in addition to having dinner he did anything else?

A. I think he did go to the race track.

Q. He stayed at the Roosevelt—Kennedy?

A. I imagine he did.

Q. Kastel didn't pick up the check there?

A. No, I couldn't tell you that.

Q. And you didn't pay it?

A. No, I never paid it.

Q. During this period after the election of Kennedy, you were still seeing Neal?

A. Yes.

[fol. 271] Q. And Sarubbi. By this time you had met Neustein?

A. Yes I believe I met Neustein once or twice.

Q. And you saw Rosenthal occasionally?

A. Yes.

Q. And Stand quite often?

A. That's right.

Q. When did you met Stand for the first time?

A. I met Stand after Kennedy became leader.

Q. Who introduced you to Stand?

A. Kennedy.

Q. And do you recall where that was?

A. At the Norse Grill of the Waldorf.

Q. Had you a meeting with Kennedy at that time?

A. No, they were having lunch.

Q. What did he say with respect to Stand?

A. He said “Do you know Bert Stand?”

"I knew of him but never had the pleasure of meeting him."

That was the introduction.

Q. And then you became friendly with Stand?

A. That's right.

Q. And you are still seeing Fay?

A. Well, no, I don't believe I have seen Fay, maybe once.

Q. Well, let me put it this way, Fay didn't have a quarrel with you at that time?

A. Oh, no.

Q. And you continued to see Di Salvio?

A. Yes.

Q. And all of those persons that I have mentioned voted for Kennedy so far as you know?

A. Yes, so far as I know.

Q. Now, I think you have told us that Kennedy telephoned you and conferred with you from time to time.

A. Before election?

[fol. 272] Q. Now, this is after election now.

A. Just what do you mean. What do you mean by "conferred with me".

Q. Let us put it this way: let us say in 1943 wouldn't he have occasion to speak to you? Wouldn't he have occasion to call you up and ask you for an appointment?

A. Well, he had one occasion that I can remember.

Q. Well, what one was that?

A. That I met him? He made an appointment with me and I met him in Longchamps restaurant.

Q. Even long before that, isn't it true that he called you from time to time and asked if he could meet you? For example, here is a conversation on June 24, 1943. Let me read it to you and see if this does not represent one of a number?

A. Refresh my mind.

Q. Yes.

"Kennedy: Hello Frank, how are you? I tried to get you a few times in the morning but you had left.

Costello: I tried to get you but you went to the country.

Kennedy: I am working like hell.

Costello: Yes, I see you are, Mike.

Kennedy: I'd like to see you for a minute, say, about 10:30. Is that all right?

Costello: Sure.

Kennedy: The Essex House lobby.

Costello: Okay, Mike, I'll see you there."

Now, do you recall that conversation?

A. That is in June?

[fol. 273] Q. Yes, June of this year.

A. I believe I did.

Q. Do you recall what he wanted to see you for at that time?

A. Maybe I wanted to see him. I left word for him to call me.

Q. But that is not unusual; you did see him from time to time, either he called you or you called him?

A. I don't know if I ever called him.

Q. At his office.

A. At his office I don't remember I called him.

Q. Well, if you didn't, you got in touch with him through Clarence Neal or Bert Stand?

A. Yes.

Q. There is no reason why you would not call him at the office?

A. No reason at all, just simply if I would meet Clarence Neal—"If you are going to Tammany Hall or run into Mike, I would like to get in touch with him."

Q. And he from time to time did little favors for you, isn't that so?

A. He never did a favor for me.

Q. Now, Mr. Costello, didn't he try to get a job for your nephew?

A. That contract as you would call it, I gave to Bert Stand.

Q. You knew that Kennedy was working on it?

A. Well, I didn't get it direct, so I misunderstood your question.

Q. Then getting back to the question, it is true that he did something for you?

- A. If you put it that way, that is right.
- Q. Although you channeled it through Stand?
- A. Yes.
- Q. That man's name is Pangatura?
- A. That is right. He calls himself Pang.
- Q. How is he related to you?
- A. I believe he is a distant relative of some kind, but he calls himself my nephew.
- [fol. 274] Q. You call him Pete?
- A. Yes.
- Q. He refers to you as uncle?
- A. Yes.
- Q. And he works for Judge Savarese?
- A. Yes.
- Q. Did you get him that job?
- A. No.
- Q. Well, did you introduce him to the Judge?
- A. No.
- Q. You were helpful to Judge Savarese last year, weren't you?
- A. No.
- Q. You didn't do anything for him politically?
- A. No.
- Q. Make any contribution to his campaign?
- A. No.
- Q. Did you make any contribution to Marcantonio.
- A. No.
- Q. Do you know Marcantonio?
- A. Slightly.
- Q. You have been to his club?
- A. No.
- Q. How long has Pete worked for Judge Savarese?
- A. I imagine the last few months—three or four months.
- Q. And you had nothing to do with getting him the job?
- A. Yes.
- Q. And you know the Judge very well?
- A. I met the Judge through Pete.
- Q. You met him through Pete?
- A. Yes, they have been friends for years.
- Q. And you spoke to Kennedy from time to time about Pete's job, didn't you?

A. Not from time to time—not Kennedy. I never spoke to Kennedy on the subject I spoke to Bert Stand.

Q. Are you sure about that now?

A. Positive.

Q. Let me read you a conversation with respect to that. This is on May 12th of this year. Pete is calling you. You say hello.

[fol. 275]—“Pete: Hello, uncle. This is Pete. I have quite a schedule for the week and I know you are tied up yourself. How about seeing you next week?”

Costello: All right.

Pete: If you run into Mike, ask him what happened in Washington.

Costello: I will see him tomorrow.

Pete: All right, Uncle Frank. I will see you on Monday of next week.”

A. Yes.

Q. Did you see Kennedy the following day?

A. Yes.

Q. But you asked Stand?

A. Yes.

Q. And he would report to you?

A. It is practically the same thing.

Q. There came a time, didn't there, when Pete got a letter that was sent to Kennedy and do you remember he told you that—this is in July—“I got a letter that was sent to Mike. I am still being considered down there, so I thought I should let you know about it.”

A. That is right.

Q. But he didn't get the position as I understand it?

A. That is right.

Q. Well, you appreciated that effort of Mr. Kennedy's in any event, even though he didn't get the job?

A. That is right.

Q. Now, you are also friendly with an assistant district attorney by the name of Loscalzo?

A. Yes.

Q. How did you meet him?

A. I met him through Pete also.

[fol. 276] Q. In the last five or six months?

A. Yes. You see they are in Long Island.

Q. And you have seen him from time to time—Loscalzo?

A. No, I probably saw him three or four times.

Q. Now, wasn't there some little favor that he wanted?

A. A favor that he wanted?

Q. Yes.

A. No, not to my knowledge.

Q. Well, now, didn't Pete keep you advised of what was going on in Queens politics and tell you what Joe Loscalzo wanted?

A. I didn't do him any favor, but I think that he wanted either to run for district attorney or something and he thought that maybe I could talk to Mike Kennedy and Mike would talk to his leader—something of that kind. I didn't pay much attention to it.

Q. Then Mike did talk to him?

A. Talk to who?

Q. Loscalzo.

A. Yes.

Q. And he talked to him at your request?

A. At my request.

Q. And you made the request directly of him?

A. To Mike?

Q. Yes.

A. Well, it came about this way. I had a luncheon appointment with Joe Loscalzo and he told me about this leadership—about this district attorney he wanted to run for district attorney, and that his leader had someone else in mind or something, and then he spoke about a county court judge. And he said "I wonder if Mike knows my leader"—his executive leader in Long Island. I said, "I don't know whether he does or not." He said, "I would like to get Mike to talk to my leader." I said, "I will call Mike up and make an appointment for you," which I did.

Q. Yes. That I think squares with some of these conversations. For example, here is one on May 29th when [fol. 277] Pete called you and says, "I guess you were wise to play golf today. Say, I found out who is behind Farrell in Brooklyn."

"Costello: Who?"

"Pete: The Bishop. Can you beat that?"

Now, would that be in reference to the county judgeship over there?

A. I don't remember the conversation.

Q. In Queens I mean. You don't recall that?

A. No.

Q. Well now, you say now: "Did you speak to that other fellow as I asked you?" And Pete says: "Yes, I did. He said 'Use all you want, but things were slightly different. I suppose I will have to get a few Irish Catholics with me.'" Does that bring anything back?

A. No.

Q. Then you say: "Why don't you drop over to the golf course and see me tomorrow?" And Pete says: "I think I will. I'll have Joe with me." That will be Loscalzo, won't it?

A. Yes.

Q. And you did see him at the golf course?

A. Yes.

Q. Then you add: "Why don't you bring the Little Judge along also?" Would that be Sayarese?

A. Yes.

Q. You say it was Loscalzo's interest to get the nomination district attorney or County Judge?

A. Yes.

Q. But you don't remember the name Farrell mentioned as candidate?

A. He might have mentioned the name but I don't remember.

Q. When you spoke to Kennedy he told you that he would see Loscalzo?

A. Yes. That is, I spoke to his secretary and made my arrangements through his secretary.

Q. You mean Stand again?

A. Yes.

[fol. 278] Q. Kennedy had told you afterwards that he had seen Loscalzo?

A. Yes.

Q. And Loscalzo told you that he had seen Kennedy?

A. Yes.

Q. And that Kennedy would do whatever he could for him?

A. Well, Kennedy told me that he couldn't do anything for him.

Q. Because it was outside his county?

A. That's right.

Q. Now, did you ask your nephew to report to you on what was going on with his work over there?

A. No.

Q. Well, let's see if we can interpret this conversation on June 22nd. He says: "Hello, Uncle Frank, I saw the little fellow." That would be Savarese?

A. That's right.

Q. "And he wanted to know when I spoke to you last.

"Costello: He must be busy in that courtroom.

"Pete: He's doing O. K. I am getting very close to him now, so I know exactly what's going on."

Was that a report that you requested?

A. No.

Q. Just reporting on how he was getting on with his work?

A. Maybe for the job. He was looking to get some sort of job.

Q. Then he asked you if you went to the dinner last night. You say no. "Did you see Mike's picture with Farley and O'Shea in the paper?"

A. No, I don't recall that conversation.

Q. See if you can remember this. "Yeah, tell the Judge I'll take him fishing before the week is out, the three of us." That would mean Judge Savarese?

A. Yes.

Q. Did you go fishing with him?

A. No.

[fol. 279] Q. "Pete: O. K. Uncle Frank, I think he would be delighted. He asked me how I liked things around here. I told him. I'm close enough to know what's going on and I am going to put the ax to some of those people." Do you recall that?

A. No.

Q. Do you know any reason why Pete should put the ax to people working with Savarese?

A. No.

Q. I suppose he meant that they might lose their jobs and he is getting somebody else in there?

A. No, I don't know what he had in mind. I don't recall it. All I know is that he was looking for a job himself.

Q. Then about this time, in July, you had occasion to meet Loscalzo. How many times would you say you met Loscalzo?

A. Maybe five times.

Q. At the golf links and other places?

A. One time at the golf links.

Q. Now, didn't there come a time when Loscalzo was interested in the leadership of Queens? Do you remember Pete saying anything to you about that?

A. No, I don't remember. He might have, but I just don't remember.

Q. Now, let me read this conversation. This is in July, Mr. Costello, July 23rd. He says: "Hello, Uncle Frank. Did you see what happened out here?" Costello: "No." Pete: "Roe went into the army and I think Joe has a chance to get in. This is our chance." Now, Roe would refer to the Democratic leader of Queens, is that right?

A. Yes, he would be the Democratic leader.

Q. And what Pete meant, with Roe in the army, it was Loscalzo's chance to get the leadership?

A. I imagine so.

Q. Did he ask you to have Loscalzo speak with Kennedy in connection with that?

A. No, sir.

Q. Do you know that Loscalzo did speak to Kennedy in connection with that?

A. He might have.

[fol. 280] Q. Did Kennedy ever tell you that that was discussed with Loscalzo?

A. No, sir.

Q. You have told us some favors Loscalzo requested, Mr. Costello. Did he ever ask you to do anything else for him?

A. No.

Q. Did you ever suggest that you could do anything for him, that you were in a position to do anything for him?

A. No.

Q. You never told him that you thought he was foolish plugging away out there in Queens in the public service?

A. I imagine one time I told him that he was foolish, that he did not retire and go in the law business.

Q. Did you offer to be of any assistance to him in that connection?

A. No.

Q. Did you know of any law business that he had?

A. No.

Q. Now, let us see another item or two about Pete and then we will forget him a little while. You got him a job at the race track in July?

A. Yes.

Q. What was it, a timer?

A. Yes, I imagine a timer.

Q. And what did you get, \$8 a day?

A. I really don't know. It couldn't have been much more.

Q. But his name was not put on the program, was it?

A. I never saw one of the programs.

Q. Who got him the job, George Levy?

A. George Levy.

Q. And you asked George to get it for him?

A. That is right.

Q. Do you recall saying to Pete on July 26:

[fol. 281] "George got you on official's job—a starter. Your name is not on the program. I thought it might conflict with the other thing. Go and see George this morning."

Do you remember anything like that?

A. Yes, I might have told him that. It might have conflicted because he was holding another job in the Surrogate's Office.

Q. So you wanted him to hold two jobs?

A. That is right.

Q. Fair enough. Now, did you speak to Kennedy also about Louis DiSalvio?

A. Who is Louis DiSalvio—Jimmy Kelly's son?

Q. Yes.

A. No.

Q. Didn't you ever talk with Kennedy and ask him to do something for him?

A. Not that I remember.

Q. Now, let me call your attention to a conversation on May 31, 1943. Do you remember Kelly was in the hospital?

A. Yes.

Q. And you called up to find out how he was:

"Costello: Hello, Jimmy. How do you feel?

Kelly: About the same. I'd like to get out of this hospital but I got to wait.

Costello: Sure, take it easy till you're o. k.

Kelly: What's new?

Costello: Doc still don't know where you are."

That would be a reference to Sarubbi?

A. Yes.

"Kelly: No.

Costello: You would think he would be wondering [fol. 282] where you are. He could call me up and ask me if I heard from you.

Kelly: He's in the country.

Costello: That's all he cares.

Kelly: I gave Louis \$40 to give him today.

Costello: I had quite a talk with that guy about your Louis.

Kelly: I hope he gets something for him."

Now, doesn't that refresh your recollection? Wasn't there something that Louis wanted that you spoke to Kennedy about or spoke to Stand about?

A. I never spoke to Kennedy or Stand about Louis.

Q. Would it be another Louis that you had in mind? Would you say it was Capozzoli?

A. No, it might be somebody that was looking for a job.

Q. Were you interested in the appointment of Mr. McNally as United States Attorney?

A. No.

Q. Didn't you talk to Kennedy about that?

A. I don't know McNally.

Q. You never met him?

A. No.

Q. You know that he is very friendly to Kennedy?

A. Well, I presume he is.

Q. Well, could you explain why you might refer to McNally as your man?

A. No.

Q. Do you want to take time to read the conversation? I tell you that in a conversation with Pete, Pete says, "Is McNally your man?" and you said, "Yes." Do you know why you might say that?

A. I don't remember saying that, and if I said that, [fol. 283] I might have reference that he is a Tammany Hall man or something.

Q. In any event, you have never met him?

A. I have never met him.

Q. Now, Neal and Stand have been to your apartment, haven't they, Mr. Costello?

A. Yes.

Q. Did you ever have any business dealings with Stand at all?

A. No.

Q. Any business dealings with Neal?

A. No.

Q. So that any conversation you had would either be social or political?

A. That is right.

Q. Did you attend any political affairs?

A. No.

Q. Didn't you go to Webster Hall in June?

A. Oh, yes, the beefsteak—Jimmy Kelly's Beefsteak.

Q. Didn't you also go to Rosenthal's Beefsteak?

A. You say June? Wait a minute now.

Q. Kelly's was January, Rosenthal's was June.

A. It was the first one I really ever went to.

Q. Didn't you go to the one in June, also?

A. That is a ham and cabbage.

Q. And whose guest were you?

A. I believe a fellow by the name of Irving Sherman.

Q. Wasn't it Congressman Klein?

A. No.

Q. Don't you remember Congressman Klein calling you from Washington and inviting you to go?

A. But I wasn't his guest. I was the guest of Irving Sherman.

Q. But the Congressman did call you and tell you about it and asked you to be there?

A. Yes.

Q. Who else was at the table with you?

A. Irving Sherman, myself and two other people that were with Irving Sherman; I don't recollect their names.

[fol. 284] Q. Nat Hershfield-And Klein, wasn't there?

A. He was there, but not at that table.

Q. Now, from time to time during the early months of this year—March, April and May—persons were coming to you with respect to political difficulties, particularly with primaries. Isn't that so?

A. No.

Q. Do you remember a man by the name of George Greer coming to you?

A. George Greer?

Q. Yes. Do you remember Frank Hale speaking to you about a Tammany leader named Greer?

A. Yes.

Q. And Greer came to you and told you that Kennedy was easing him out and asked you to do something about it?

A. No, Greer didn't tell me that.

Q. What did he tell you.

A. Frank Hale told me that.

Q. You did see Greer?

A. I saw Greer, yes.

Q. And he told you pretty much the same thing, didn't he? I mean, didn't he repeat the story?

A. I believe I saw Greer after he was defeated, or something. I don't remember seeing him before the primaries. I never knew Greer.

Q. I know that, but you knew Hale?

A. Frank Hale, yes.

Q. And Hale brought Greer to you?

A. Yes.

Q. And Hale brought Greer to you, because he had heard that you knew Kennedy well and were influential with Kennedy, isn't that so?

A. That is right.

Q. Then you told Greer to see Kennedy?

A. That is right.

Q. And then you reported back to Hale that nothing [fol. 285] could be done for Greer, isn't that right?

A. I believe I did, yes. It was a local fight and that Kennedy must have said that nothing could have been done for him.

Q. See if this does not refresh your recollection. It is a conversation between you and Hale:

"Costello: Did that fellow get in touch with you?

Hale: He just finished talking to me and I told him what you said. He said that Mike took it away and put your man, Rosenthal, in."

Now, that would have reference to his job in the Board of Elections?

A. I never knew Greer was in the Board of Elections.

Q. Well, in any event, you know who Rosenthal is?

A. Yes.

Q. And if I told you that Rosenthal is presently working in the Board of Elections and that Greer used to work there and then lost his job, the chances are that this sentence refers to that situation; isn't that so?

A. No, I don't believe so.

Q. Well, what do you think it refers to?

A. I never knew that Greer worked in the Board of Elections.

Q. Let me read what you said.

A. Yes.

"Costello: Why shouldn't I, as this fellow is a rebel and my man was in line? What does he care about Dunn? Dunn wouldn't do a thing for him. Can you have him at your room about four o'clock tomorrow afternoon?"

Now, you explain that in your own way.

A. The only way I can explain is that it was near Primary and this fellow Greer, which I never met in my life— [fol. 286] Q. You mean you had never met him before that?

A. I had never met him before that—and he had a fight on hand. So Frank Hale, which I have known for many years, called me, for me to meet him. I met him and he explained the situation. He said this fellow was a buddy of his, could we do anything for him. I said, "There is nothing I can do for him. I don't know a captain; I don't even know his district." He said, "Well, maybe you can talk to Mike." I said, "Well, I will talk to Mike," and I spoke to Kennedy. I said, "Do you know Greer?" He said, "Sure I know him." I said, "He has a fight. Now, Frank Hale came to me and asked to sort of favor him, because he is a friend of his." He said, "I can't do nothing. There is a local fight and I can't butt in. Anyway, he is a rebel and it wouldn't look nice for me to do anything."

Q. You were pretty much repeating to Hale what Kennedy told you; why should he. Because this fellow is a rebel?

A. That is right.

Q. What do you mean when you say, "Dunn wouldn't do a thing for him." Does that have reference to Philip Dunn, the lawyer who was opposed to Kennedy?

A. That is right.

Q. And Kennedy probably told you that Greer was on Dunn's side?

A. Something, I don't remember.

Q. Here we have another reference to Dunn, in a conversation of June 10th, and this is from Fay I presume. Correct me if I'm wrong.

"Fay: Hello Frank. How's things?

Costello: Perfect.

[fol. 287] Fay: I saw Mike last night and I saw Dunn also.

Costello: I saw Frank yesterday. He had a couple of bad days at the track. He felt bad."

Would that be Ericson?

A. Will you read that over again, please?

Q. Yes. This is a conversation between you and Jimmy.

"Jimmy: Hello, Frank, how's things?

Costello: Perfect. I saw Mike last night and I saw Dunn also. I saw Frank yesterday. He had a couple of bad days at the track. He felt bad.

Jimmy: What can you do? Say, Frank, I'd like to have lunch with you.

Costello: I am very, very busy. I'm waiting for a fellow to pick me up now. Suppose some day next week.

Jimmy: Fine. I'll get in touch with you."

Could that be Fay or DeSalvio?

A. It could be Fay or DeSalvio, but I never mentioned Dunn.

Q. This must have been my mistake. It was Jimmy who said, "I saw Dunn last night."

A. Oh.

Q. Would you say that this was DeSalvio that you had this conversation with?

A. Probably.

Q. Does Fay know Ericson?

A. I suppose so.

Q. You know Ericson?

A. Yes, sir.

Q. Do you go with him frequently?

A. Yes.

Q. See him often?

A. Quite often.

Q. Well, now then, to that extent you did have some interest in the Greer difficulty. Now, how about Neustein? Did you have any interest in his primary fight?

A. No.

Q. Do you recall telling Rosenthal that, "We will have [fol. 288] to do something with Danny Neustein"?

A. I might have but I just don't remember.

Q. Well, you know Joe Biondo very well?

A. I know him but not any too well.

Q. You know he is influential in Neustein's district?

A. I know he's interested in that.

Q. Well, he comes from that general neighborhood?

A. Yes.

Q. Isn't it true that you told Biondo to help Neustein?

A. No.

Q. Are you sure of that?

A. Positive.

Q. Did you tell anybody to pass the word on to Biondo to help Neustein?

A. No.

Q. Or to help Rosenthal?

A. No, not to my knowledge.

Q. But you might have said to Rosenthal, "We will have to do something to help Danny Neustein."

A. I might have, but I just don't recall.

Q. Now, how about Mancuso? Did you talk to Kennedy about Mancuso?

A. No.

Q. You know Mancuso?

A. Yes.

Q. Didn't you aid in his selection at all?

A. No, sir.

Q. Didn't Neal speak to you about Mancuso?

A. Yes.

Q. And Stand?

A. No, Neal.

Q. Didn't he ask you whether you thought Mancuso would be a good leader?

A. Yes.

Q. What did you say?

A. I said, "Well, I've known Mancuso for years, even before he was a judge. I think he would make a good leader, yes."

Q. Did you know Hubbard?

A. Yes.

Q. Did you speak to Hubbard in connection with his retirement?

A. No.

[fol. 289] Q. Did Neal pass on your word to Kennedy about Mancuso?

A. I believe Neal spoke to Kennedy.

Q. Did Kennedy say anything to you about it?

A. Well, he spoke to me about it and he said, "It is a local fight. Let the best man win."

Q. Did he say, "Frank, I understand you have known Mancuso for a long time"?

A. He didn't have to ask me. They all know I know the man.

Q. Did you do anything to help him up there?

A. Nothing.

Q. Did you tell Neal to pass it on to the others?

A. I didn't tell Neal to pass it on. He came to me.

Q. And he asked you?

A. Yes.

Q. And you approved?

A. Yes.

Q. Now, during this period—and we are now speaking of May and June of this year—you were still in touch with Sarubbi?

A. Yes.

Q. And as a matter of fact, he was good enough to telephone to California several times to ascertain how a friend of yours was getting along?

A. That is right.

Q. And that is Willie Moore?

A. That is right.

Q. And you were instrumental in sending Moore to California, weren't you?

A. No.

Q. You knew he was going there?

A. Yes, his doctors told him to go away.

Q. He called you any number of times from California?

A. Yes.

Q. And you asked Dr. Sarubbi to call up and ascertain whether Willie was normal or not?

A. That is right.

Q. Your doctor is Lordi?

A. John Lordi.

Q. You have never used Sarubbi as a doctor?

A. Yes.

[fol. 290] Q. What for?

A. I had Sarubbi as a doctor because I had a fistula, whatever you call it.

Q. How long ago was that?

A. It is about a year and a half ago. And he treated my throat and he is the one that brought me to Dr. Lordi.

Q. Then wasn't it some time in July that Dr. Sarubbi became ill?

A. Yes.

Q. Do you recall Jimmy Kelly telling you that the Doctor had a bad case of arthritis?

A. Yes.

Q. And you asked what his number was and you telephoned there?

A. That is right.

Q. And you spoke to some woman? See if this does not refresh your recollection. You asked for Dr. Sarubbi and a woman answers:

"The Doctor is sick and is in bed. He can't talk to anybody.

Costello: Will you tell him that Frank called and tell him if he needs anything to get in touch with me. Also ask him to call me as soon as he is allowed to phone."

Woman: Thank you very much for calling.

Costello: I would have called sooner only Jimmy Kelly just told me. Give him by best."

Do you recall that conversation?

A. Yes.

Q. And you told the woman, who was probably Mrs. Sarubbi, if he needed anything to let you know?

A. Yes.

Q. He was a good friend of yours, wasn't he?

A. That is right.

[fol. 291] Q. You never tried to get him removed as a leader at any time, did you?

A. Well, that is—not that I tried; it is a different story.

Q. Who tried?

A. Well, I believe Mike Kennedy.

Q. Tried to get him out?

A. Wanted him removed.

Q. Why?

A. Well, he was sick, and he told me that the district was going to hell, and he didn't have the nerve to tell him himself. "He is your doctor and a good friend of yours. Maybe you can break the news to him and it won't look so bad for me, to talk on the subject in front of the other leaders. He probably won't like it."

Q. When did you see Kennedy last?

A. I saw Kennedy about a week ago.

Q. Did you do anything in connection with this?

A. Did I?

Q. Yes.

A. No, nothing. We have had the conversation but nothing was done. The man was sick. I never spoke to the doctor on the subject. He is still sick.

Q. Do you know whether Kennedy has spoken to him about it?

A. No. I don't believe so.

Q. Now, this business of politics was taking more and more of your time?

A. Well, it wasn't taking much of my time.

Q. Do you recall telling Mr. Kastel that you couldn't go to New Orleans because you were tied up on account of the election?

A. I might have told him that, yes.

Q. Well, if you told it to him it would have been the truth?

A. No. I probably might have used it as an excuse.

Q. This is your associate and your partner?

A. That is right.

[fol. 292] Q. You would not have deceived him?

A. It is not a case of my deceiving him, it is just a case of my not wanting to go there too often.

Q. There is a long conversation one line of which interests me: Kastel tells you they are going to send the old masters to England and reproduce them. What is that in reference to?

A. The old masters?

Q. That they were going to send the old masters to England and reproduce them.

A. No.

Q. Do you know of any such deal.

A. No.

Q. Do you recall that conversation?

A. No, I don't recall it.

Q. This is the conversation which starts out this way:
You ask—

“Did Jim get there?

Kastel: Yes, yesterday.

Costello: Those people who got our office—well, this fellow and the other fellow who is supposed to be our friend is President.

Kastel: He came back with his chin down.

Costello: In the meantime I loaned him a yard and a half.”

Do you recall that?

A. Did he say “Jim”?

Q. Yes.

A. Well, it happens to be, I know Gene McGee.

Q. That's Fallon's partner?

A. Yes.

Q. You did lend him \$1500?

A. No, a yard and a half is \$150.

Q. Forgive my ignorance. And was Gene going to New Orleans?

A. Yes.

[fol. 293] Q. Is he working for you?

A. No.

Q. He does come to your apartment occasionally?

A. To my apartment?

Q. Yes.

A. When he is in New York, yes.

Q. What was he doing in New Orleans?

A. I believe he is in the oil business, in Shreveport.

Q. And then there is another reference in the same conversation to things being very quiet:

Kastel says: “Outside of that, things are very quiet. Only a big week-end business. Last week end the places had to close. No ice to keep the beer cold.”

That would have reference to the slot machines?

A. To our business, yes.

Q. But you don't recall anything about the "old masters"?

A. It might have reference to McGee.

Q. You would not be sending him to England?

A. No.

Q. "They are going to send the old masters to England and reproduce them"?

A. No.

Q. But you do look upon him as an old master?

A. He is, yes.

Q. Now, of course, you were interested in the primaries. I think Primary was on August 10. Now, you did get away before August 10. Do you recall coming back on August 11, the day after Primary?

A. Shortly after, yes.

Q. And do you remember Bert Stand calling you up early on the morning of August 11, Wednesday, and giving you a report as to what happened on Primary Day?

A. He might have.

Q. Do you remember what he told you?

A. No.

Q. Do you remember him telling you "we will have to sit down and plan now"?

A. No, I don't remember. He might have.

Q. Let me just read the conversation. This is at twenty minutes to nine on August 11, 1943, the day after Primary Day:

"Stand: Hello.

Costello: Hello, Bert.

Stand: Hello, Frank, how are you? How was the trip?

Costello: O. K. What's new?

Stand: Well, the Primaries are over.

Costello: Did we do all right?

Stand: Pat Sullivan and Danny Mahon won. Dickinson beat Burroughs. And Thompson won. That's about all.

Costello: We got the best of it!

Stand: I'd say yes. We will have to sit down and plan now. I spoke to Clarence and he said he spoke to you. We will have to sit down, Frank.

Costello: I think I will call Clarence now. What's that number?

Stand: Lehigh 4-2556.

Costello: I will call him now and make arrangements.

Stand: O. K., Frank.

Costello: So long."

[fol. 295] Q. Now, you recall that conversation don't you?

A. Well, that conversation might have taken place, I am quite sure, and I might have been inquisitive to know. Naturally, I am a Tammany Hall man. I am ready to get some results.

Q. And you said: "Did we do all right?" You mean Kennedy and you and Stand and Neal and the rest of the group that had been together, isn't that right?

A. Well, yes.

Q. And when you said: "We got the best of it" you referred to the same group?

A. That is right.

Q. Now, what did you mean, and explain it in your own words—what did Stand mean to convey when he said "We'll have to sit down and plan now"?

A. I don't remember even. I don't remember that at all.

Q. You said it twice. Wouldn't you have some occasion to sit down and plan?

A. I don't know what the occasion would be.

Q. Let me point this out. This was on August 11th and the Judicial Convention was Monday, August 23rd. Doesn't it suggest that you and he and Neal and Kennedy would have to sit down and plan with respect to the Judicial Convention? Is that what it meant? "Sit down and plan now."

A. No, I don't believe it was that at all.

Q. The fact is that you did have many conversations about the judges after that, didn't you?

A. About the judge.

Q. After this, do you remember how Stand would come

to you and tell you how Mike was thinking of Byrnes and Gavagan and Raimo?

A. Yes, that is right.

Q. Doesn't that refresh your recollection, Mr. Costello, and doesn't it mean that you and Clarence and Kennedy and Stand would have to sit down and plan about the [fol. 296] Judicial Convention and the other political matters that were immediately in the offing?

A. I don't know. I wouldn't have no business to sit down with him.

Q. But you did all along, didn't you?

A. Well, no, I wouldn't say all along. I am not denying, Mr. Hogan, that I didn't pull for the Judge, but as far as sitting—I know less of politics than my maid does.

Q. Well, you probably don't know the details, but you know the big things that are going on, isn't that true? What did you mean when you said: "I will call Clarence now and make arrangements." Didn't you mean that you were going to make arrangements for a meeting between you and Stand and Neal to talk about these things?

A. Well, no, I wouldn't put it that way.

Q. Well, you did call Clarence right after that, about three minutes later. You did put in a call, and I will read it to you.

"Costello: Hello, Clarence. This is Frank.

Neal: When did you get in?

Costello: Late last night. I was coming in by train and at the last minute I got a seat on a plane. How are things?

Neal: O. K. I will see you down there.

Costello: O. K. Clarence."

Didn't he mean the Waldorf? Did it?

A. It might have meant the Waldorf.

Q. And that was the first step you took after receiving the call from Stand with respect to sitting down and planning with somebody, isn't that so?

A. I don't know what you mean by that "planning".

Q. Well, talking. Talking with him, talking or discussing what was next.

A. Maybe talking.

[fol. 297] Q. Here Stand reported to you that "We did all right. Our man won." Now you and Stand and Kennedy and Neal were going to sit down. "All right, we won that battle. Let's talk over the next one." Isn't that true?

A. No, sir, that wouldn't be true because I wasn't interested in the next battle.

Q. Why did you say: "I think I will call Clarence and make arrangements." You didn't ask Stand what he meant by that, did you? You didn't say: "Bert, what do you mean, sit down and plan now"?

A. No, I don't believe I asked him that.

Q. Then you understood what he meant, didn't you?

A. Well, I don't deny the gist of the conversation, but I will deny "sit down with him to plan".

Q. Would you deny that you sat down and talked about the judicial ticket?

A. I might have.

Q. You have been very frank so far, Mr. Costello, and I want to compliment you.

A. I know.

Q. And I think you are pursuing a very wise course, and I want you to continue to be frank with me. Will you do that?

A. Well, I am trying to.

Q. Now, Stand and you and Neal and others were interested, very frankly, in Mr. Aurelio for Supreme Court Judge, isn't that so?

A. Yes.

Q. And all of you have done things in the preceding months of 1942 to bring that about, isn't that so? You had talked to persons and you had met him?

A. That is right.

Q. And tried to do everything you could for him. Who was the first to suggest Aurelio's name to you?

A. Dr. Sarubbi.

Q. And when was that, to the best of your knowledge? [fol. 298] A. The first time I met Judge Aurelio was at Jimmy Kelly's Beefsteak. I was introduced to him.

Q. Who introduced you to him?

A. Dr. Sarubbi. About a week or ten days later, I imagine, he said to me "I understand they are going to put

an Italian on the ticket. Aurelio will make a good judge. He has a fine record, a war veteran, a District Attorney, a judge, he is a very good friend of mine and I am going to pull for him." Now he said, "If you see Mike, if you can put in a good word, I wish you would. You can also talk to Kelly." I said: "I will do that, Doc."

Q. And you did speak to Kennedy?

A. Yes, and I spoke to Kennedy, and I spoke to Clarence Neal.

Q. What did you say to Kennedy?

A. I said: "Mike, if you are going to put an Italian on the ticket I understand Judge Aurelio, Sarubbi is interested in him. He comes from Abe Rosenthal's district. I wish you would give him a little consideration."

Q. Was this shortly after the Beefsteak?

A. Yes.

Q. And you had met Aurelio at the Beefsteak?

A. At the Beefsteak for the first time.

Q. Did you have a conversation with Aurelio at the Beefsteak?

A. No conversation at all.

Q. Was it Sarubbi who introduced you to him.

A. I believe it was Sarrubi.

Q. Then shortly after that, by reason of Sarubbi's request, you talked to Kennedy and urged him to consider Aurelio?

A. That's right.

Q. What did Kennedy say?

A. Kennedy said "I will think it over. It is early."

Q. Then you spoke to Neal?

A. Yes.

[fol. 299] Q. What did Neal say?

A. He said "Aurelio is a nice man. I will talk to Kennedy".

Q. What did Kelly say?

A. Also that he would talk to Kennedy.

Q. Didn't Mr. Kelly have a candidate?

A. Jimmy Kelly, no.

Q. Capozzoli?

A. No.

Q. Are you sure that he didn't advance Capozzoli's name?

A. No.

Q. How can you be so certain?

A. He never mentioned Capozzoli to me.

Q. He agreed to go along?

A. To go along with Aurelio.

Q. Now did you speak to Neustein about Aurelio?

A. No.

Q. You spoke to Stand?

A. To Stand, yes.

Q. Did you ask him to speak to Ahearn, his district leader?

A. Well, spoke to Stand; I thought that he would talk to Ahearn. He practically represents the district there.

Q. Did you speak to any other leaders?

A. Abe Rosenthal.

Q. Well, I guess you didn't have much trouble in persuading him.

A. No, Abe Rosenthal asked me. He said "I have a candidate." I said, "I know all about him. Dr. Sarubbi talked about him and I am going to do what I can."

Q. Do you recall any others that you spoke to?

A. No.

Q. How about Fay? Did you speak to Fay?

A. No.

Q. You didn't ask him?

A. No.

[fol. 300] Q. Why?

A. Well, I just probably didn't think of it, and I thought—

Q. He might have a candidate of his own?

A. Well, maybe I might have had that in mind.

Q. Did you find out that he had a candidate of his own?

A. There was a rumor around that he had a chief City Court Judge Byrnes.

Q. Do you know a clothing manufacturer by the name of Sam Greenberg?

A. No.

Q. Heard his name?

A. I read his name in the paper for the first time.

Q. A friend of Aurelio's? You didn't meet him?

A. I never heard of him or saw him. For the first time, in the papers.

Q. Did Judge Savarese speak to you about Aurelio?

A. Yes.

Q. And Loscalzo?

A. Yes.

Q. Both of them told you they knew him?

A. They are very good friends and he would make a fine judge.

Q. They talked to you about him and urged you to support him?

A. Yes—"If you could do something for him and speak to a few leaders."

Q. When did you see Aurelio after the beefsteak? When was the next time you saw him?

A. After the beefsteak? I know he was to my home for cocktails. I just can't place the dates now. And we had dinner.

Q. Was that before or after the time you met him in Mike Kennedy's office?

A. That is right, Mike Kennedy's office.

Q. Was that the next time?

A. No, I think that was the second time if I am not mistaken.

[fol. 301] Q. Yes, in the office?

A. In the office.

Q. And how did you happen to be there?

A. I was in the barber-shop getting a shave, which I went there frequently, and Neal was there, and he says "You are going west?" I said "Yes," and he said "I am going up to Kennedy's office." I said, "I will ride along with you." When I got there, I said, "I have a little time. I will jump up for a few minutes," and I met Aurelio there and Abe Rosenthal.

Q. Sarubbi?

A. And Sarubbi.

Q. Well, now didn't you know that Aurelio was going to be there that afternoon?

A. No.

Q. Was that the first time that you been to Kennedy's office?

A. I believe it was the second time.

Q. What brought you there the first time?

A. Probably to meet Clarence Neal. I might have had an appointment.

Q. You didn't go there often?

A. No, I don't believe I have been there three or four times.

Q. And it just happened that you were there on the one day that the man you were so much interested in was there?

A. That is right.

Q. Didn't you think that a surprise and a coincidence?

A. Yes, I was surprised to run into them.

Q. What was said while you were there?

A. Well, I don't remember exactly the conversation what took place, but I know Abe Rosenthal, naturally he had a candidate and he was talking to Mike.

Q. This was in your presence?

A. No. I was there maybe 15 minutes, 10 minutes and left just near the finish of it.

Q. They didn't ask you to step outside because you were [fol. 302] not a district leader?

A. No, but they were practically all through talking.

Q. You participated in the conversation?

A. No.

Q. Didn't you say to Mike "You recall that I spoke to you in favor of Aurelio?"

A. I might have said that, yes.

Q. What did you say to Aurelio himself?

A. Nothing outside of "Hello, Tom." I called him by his first name.

Q. No, but didn't you have a conversation with him about his ambition to be a Supreme Court Judge? He must have known by this time that you had been speaking to people on his behalf?

A. Yes, he knew it through Rosenthal.

Q. And didn't he thank you?

A. Yes.

Q. Tell us what he said. That is all we want to know.

A. I just don't remember the words. He must have thanked me and "Appreciate whatever you can do for me."

Q. By that time had the nomination been assured him?

A. No.

Q. Kennedy didn't say on that occasion "that you have it solid", did he?

A. No.

Q. Did he say it was early and he would keep considering it?

A. Yes.

Q. Did you tell Judge Aurelio at that time that you were going to continue to work for him?

A. That is right.

Q. You were going to do everything you could do to help him?

A. That is right.

Q. Whom did he come in with, by the way? Was it Rosenthal or Sarubbi?

A. I found him in there.

Q. He was there when you got there? Whom did he leave with?

A. I beg pardon?

Q. Whom did he leave with?

A. With Rosenthal.

[fol. 303] Q. And you told him that you were going to continue to work with these leaders?

A. Yes, I might have told him that.

Q. Then he was a guest at your home shortly after that, is that right?

A. That is right.

Q. And who else was present?

A. Clarence Neal, Mrs. Neal, Abe Rosenthal, Mrs. Rosenthal.

Q. Now, how did that come about, that you had him at your home? You hadn't done this before, had you?

A. No. I met Rosenthal and when I told him that I was doing all I could for the Judge, he says, "Well, you should know him better. He is a real fine fellow." I said, "Some evening I will have you up at my home and we will have dinner." And I don't know, it was three or four days later and I called him or he called me, and I said "Come on and bring the Judge and Mrs. Aurelio."

Q. You did have cocktails at your home?

A. Yes.

Q. Did you have some conversation there also?

A. Not politically, no.

Q. Where did you go from your home?

A. We went to the Copacabana. I called up and made reservations for dinner.

Q. And you were there for several hours?

A. Yes.

Q. And you told him during that period—

A. We never spoke politics.

Q. You never brought up the subject?

A. No.

Q. Rosenthal, his leader, was there and he didn't speak about politics?

A. No, not that I recall anyway.

Q. Did he say at any time during the evening that you were interested and that you were doing what you could and he appreciated it?

A. Not that I can recall.

[fol. 304] Q. And there is no doubt in your mind that both Aurelio and Rosenthal knew at this time that you were active in Aurelio's behalf?

A. That is right. I was plugging for him.

Q. And plugging with district leaders?

A. That's right.

Q. And with Kennedy?

A. That is right.

Q. No secret about that at all?

A. No, there is no secret about that.

Q. Then you saw him at Rosenthal's daughter's wedding?

A. That is right.

Q. Did you talk to him there?

A. Just for a few minutes. There were a lot of people there.

Q. That was in March also, wasn't it?

A. Yes. I know very well because I was leaving the same afternoon for the South.

Q. And did you see Aurelio in town at the cornbeef and cabbage dinner of Rosenthal?

A. Yes, just for a minute or two.

Q. He asked you very frankly what you thought his chances were, didn't he?

A. Yes. Well, I wouldn't say at that particular meeting.

Q. But somewhere along in March at one of these meetings.

A. Yes.

Q. Did you speak to him on the telephone also?

A. I believe I spoke to him once on the phone.

Q. Once before the Convention?

A. Yes.

Q. Wouldn't he discuss with you other Italian names that were up for consideration?

A. No, he never did.

Q. Would he say to you, "Well, how does it look for me?"

A. Yes.

[fol. 305] Q. And Rosenthal would say that, too?

A. Well, yes, he would.

Q. Didn't you see Rosenthal from time to time and didn't he ask you how Aurelio's chances were shaping up?

A. No, I wouldn't say that. I saw him from time to time; I ran into him, no special meeting or occasion of any kind. I would run into him in the barber-shop, and he would say "How is it coming along?" I said "What he should do is—Does he belong to societies?—all the help he needs. Plenty of help."

Q. He needs plenty of help?

A. Yes.

Q. You aren't a society man yourself?

A. No.

Q. You couldn't influence any societies?

A. No.

Q. You didn't tell him that you could influence any societies?

A. No.

Q. You told him—

A. I had a few leaders that would go along with me.

Q. You didn't tell Aurelio that you could get societies to support him?

A. No.

Q. When Aurelio asked you what his chances were, what did you say to him?

A. Well, I told him I thought his chances were very good.

Q. And that was after speaking to Kennedy?

A. Yes.

Q. And then you told him that Kennedy had indicated to you that he thought highly of Aurelio?

A. That is right.

Q. And you told that to Aurelio?

A. That is right.

Q. Now, Sarubbi would also talk to you from time to time about Aurelio, would he not?

A. Well, he hadn't much chance—the man has been sick. [fol. 306] Q. I mean before July.

A. Yes, he spoke to me a few times.

Q. And he would urge you to do what you could for his friend Aurelio?

A. That is right.

Q. Now, we have a conversation, Mr. Costello, a week before the Judicial Convention between you and Rosenthal. I will read it to you:

"Rosenthal: Hello, Frank. This is Abe Rosenthal.

Costello: Hello, Abe, how are you?

Rosenthal: Fine. It's getting pretty close to the big race. You know, the Kentucky Derby. I thought I'd say hello. I don't like to call you early in the morning over there as it has to go through two or three people. Have you got a minute today?"

And then you make an appointment to see him. You say:

"Costello: Make it at 1:00. I have to meet the chief."

Would the "Chief" be Kennedy?

A. Who made the call?

Q. Rosenthal.

A. To me?

Q. Yes.

A. I don't remember that conversation at all.

Q. Do you remember seeing Rosenthal a week before the Convention? Did you see him in that period?

A. I might have seen him.

Q. And he discussed Aurelio?

A. Yes.

Q. Is it your recollection, by the way, that by "Ken-[fol. 307] tucky Derby" he meant the Judicial Convention?

A. Yes, I understand, but I don't remember his using that expression.

Q. But the Kentucky Derby is run in the Spring, isn't it?

A. Yes.

Q. So that if he did use that expression—if a district leader used that expression, might it not have conveyed to you that he was talking about the Judicial Convention? Since that was only a week off?

A. Yes.

Q. He was, of course, pulling for his candidate Aurelio in that race.

A. That is right.

Q. And that is what you and Neal and Stand and the others were pulling for also?

A. That is right.

Q. And isn't that what they were sitting down and planning or discussing?

A. We never sat down in a group just to discuss it.

Q. But you were talking about it.

A. Well, I spoke about it, sure.

Q. And Stand and Neal and Sarubbi and Kelly and Rosenthal were talking.

A. Right.

Q. About "How's Tom doing? Do you think Tom is going to get it?"

A. On different occasions when we would meet individually, but there was never a group meeting on the subject.

Q. But you would meet one and you would meet two?

A. That is right.

Q. Now, you testified before you went to Dr. Sarubbi on one occasion to his apartment house.

A. Yes.

Q. And wasn't that in connection with Aurelio?

A. No, no; he was sick.

[fol. 308] Q. But you went?

A. To visit him as a sick man. I never discussed Aurelio with him.

Q. You discussed Aurelio every place else with him.

A. Yes, but when I seen him at his home, he couldn't discuss nothing with me. He could hardly talk.

Q. Did you go there to discuss anything with him?

A. No.

Q. Now, let me read you this conversation, Mr. Costello. August 12th. And I know that he has been well enough to talk with persons in the last month or so. He has been sick but he is well enough to do some talking:

"Sarubbi: Hello, Frank, this is Dr. Sarubbi.

Costello: Hello, Doctor. Do you feel any better?

Sarubbi: Not too good. I'll be in bed for three more weeks.

Costello: I see.

Sarubbi: That Mr. A wants to see you.

Costello: Who?

Sarubbi: That contract that was started last winter. He wants to finish it, so he would like to see you here.

Costello: Oh, yes, I know.

Sarubbi: How about 5:30 Monday at my house?

Costello: That's O. K. What's the address?

Sarubbi: It is 10 Monroe Street, Apartment HF, on the 11th floor.

Costello: O. K. Doc, tell Mr. A I'll see him there, and take care of yourself until I see you Monday."

Do you remember that conversation?

[fol. 309] A. Well, we might have had that conversation. I am under the impression that I went up there and I never could talk to Dr. Sarubbi, because he was really a sick man. When he called me, I went to see him to talk to him on the subject of going to Hot Springs.

Q. I know that is what you had in mind because you did mention Hot Springs in another conversation. But by Mr. A you meant Aurelio, didn't you?

A. Well, I don't remember.

Q. You said this, "Tell Mr. A I will see him there." He said to you, "That contract that was started last winter, Mr. A wants to finish it, so he would like to see you here." Would Mr. A mean anybody other than Aurelio?

A. No, I don't believe so.

Q. Sarubbi was interested in Aurelio?

A. Absolutely. It could not have been anybody else, but I just don't remember the details of it.

Q. When you got there, was Aurelio there?

A. No.

Q. Did you ever see Aurelio at Sarubbi's apartment?

A. No.

Q. And he was so sick that you say you did not discuss Aurelio?

A. No.

Q. That is the best you can say of that conversation?

A. Yes.

Q. But if he said "Mr. A" it probably meant Aurelio? He probably wanted to be brought up to date?

A. Up to date on the nomination.

Q. Now, a week or so before the Convention, Mr. Costello, didn't Stand tell you that he was not satisfied with the way things were going?

A. Well, he did call me one morning and told me that—have you reference to Aurelio?

[fol. 310] Q. Yes. That it looked as if Mike were veering away from what you people thought was a promise?

A. That is right.

Q. And that Kennedy was trying to run out on the promise that he made?

A. Yes, he made me to understand that.

Q. And isn't this the conversation that you have reference to, on August 14, 1943:

"Costello: How is things?

"Stand: I had a talk with Mike yesterday and I'm not satisfied with things as they stand. The Mick will have to wait."

Whom did he mean by the "Mick"? Would that be Gavan or Byrnes?

A. Maybe Byrnes.

Q. Then he said, "You sure have a lot of work cut out for you." I suppose he meant that you had a lot of work getting Kennedy back to the place where you had him before.

A. Yes.

Q. And that place was in favor of Aurelio?

A. That is right.

"Costello: It looks that way.

"Stand: It appears as though he gets you to a certain point and then leaves you stand. He wants to talk to you. He figures he can turn on the charm and tell you about what one Irishman said to the other and you will release him."

He intended to convey there that Kennedy wanted you to release him from the promise that he and Kennedy had made to you with reference to Aurelio?

A. Yes.

[fol. 311] Q. And continues: "Stand: If you stand pat, everything will work out."

A. Yes.

Q. That is, if you hold to the promise—

A. Yes, I remember that conversation.

Q. And you do recall this conversation?

A. Yes.

Q. Then Stand continues. He says, "He has those two stiffes, Buckley and that other Irishman. They can wait." Who is the other one, Mr. Costello?

A. I don't know who.

Q. Well, some other Irishman. There are lots of them.

A. I presume so.

Q. "He is also putting up a Mick for lieutenant governor. He's got plenty of other Irishmen on the ticket.

A. Yes.

"Costello: Yeah. Higgins.

Stand: Yeah. He also has Collins and McGeehan. If he gets in touch with you, let me know what he has to say.

Costello: O. K. I'll be at the shop if you need me."

Now, that conversation has taken place?

A. Yes.

Q. And it has reference to the fact that Kennedy was trying to side-step on the promise he made on Aurelio?

A. That is right.

Q. Now, after he had given you this information, Mr. Costello, what did you do about it?

A. I spoke to Kennedy.

Q. The 14th was on a Saturday. Do you remember when you spoke to him?

A. Oh, probably a few days later.

Q. Well, maybe this will refresh your recollection. On Monday morning, the next Monday morning, August 16th, there is a call:

[fol. 312] "Costello: Hello."

Mike: Hello, Frank. What are you doing?

Costello: Having a little coffee. How are you Mike?

Kennedy: O. K. Are you coming down today?

Costello: Yes, about twelve. I have another appointment.

Mike: O. K. See you then.

Right, Mike."

Then you probably saw him the following Monday.

A. Probably.

Q. What did you say to him?

A. I asked him about Aurelio.

Q. Yes?

A. And he told me that Aurelio does the ticket honor. In other words, just the reverse, the opposite of what Bert Stand told me.

Q. Is that the charm that Bert was talking about?

A. He said "He does the ticket honor—war record and so forth." He said he will be on the ticket.

Q. In other words, he assured you that he was going to stick to his promise?

A. Yes.

Q. Did you say "that Bert tells me—"

A. No.

Q. You didn't want to give Bert away?

A. That is right..

Q. Did you see Bert the same day?

A. I don't know if it is the same day, but I saw him later, maybe the following day or two days later.

Q. Did you tell me that he was getting his information mixed up?

A. Yes, I told him that he is going along with Aurelio. [fol. 313] Q. So Kennedy repeated the promise to you on August 16th, that Monday?

A. Yes.

Q. Now, how long before that had he given you the promise, Mr. Costello, as far back as March or some time between March and August?

A. Well, not March. Probably a month before.

Q. Sometime in July?

A. In June or July.

Q. Was there anybody present at that time?

A. No.

Q. Just you and he?

A. Yes.

Q. He said, "As far as Aurelio is concerned, it is O. K."

A. As far as Aurelio is concerned "I think it is O. K."

Q. Did you repeat that to Aurelio?

A. No.

Q. Did you tell it to Rosenthal?

A. I might have told it to Rosenthal.

Q. With the intention that he repeat it to Aurelio?

A. Yes.

Q. Now, that was Monday, the 16th of August, that Kennedy repeated his promise. Now, you saw him the next day at Longchamps restaurant, and that was a Tuesday, the Tuesday before the Convention; do you remember that?

A. Yes.

Q. Do you remember that you were there for a couple of hours with him?

A. Yes.

Q. With whom?

A. Bert Stand, Clarence Neal, Mike Kennedy and myself.

Q. The four of you?

A. That is right.

Q. Now, what did you have to discuss for two hours at Longchamps?

A. Well, the discussion was—I believe that was the meeting we had where he wanted me to suggest, instead of suggesting it himself in front of Neal, which is a leader, about Sarubbi retiring.

[fol. 314] Q. That did not take two hours?

A. Well, we had coffee and we talked of a lot of things in general.

Q. Did you have any argument about this?

A. Oh, no.

Q. Do you remember that Kennedy did not get there until about twelve o'clock, that you and Neal and Stand were there for a half hour before that? Do you remember that?

A. Well, I just don't remember who got in first or last, but I know the four of us were there.

Q. Didn't you also discuss the judicial ticket?

A. No.

Q. Are you positive of that?

A. Almost positive.

Q. What did you and Kennedy have to talk about earlier that day? Do you remember he called up and said, "Listen, you've got a meeting with Stand at ten o'clock. Shift it back to 11:30"?

A. That is right.

Q. What did he have to talk to you about before eleven-thirty on that day?

A. Kennedy had made this meet himself to Bert Stand. He said: "I would like to get Neal and Frank. I want—I have something to say." In his mind, he thought that he was going to get me to get Dr. Sarubbi withdraw from his leadership, and it seems that very night he probably changed his mind. He thought it was a little too obvious that he, being the leader of Tammany Hall, to suggest to a man to retire because he was sick, in front of the other leaders; and he tried to give me the contract. He called me in the morning and said: "I want to see you before we meet in Longchamps"—and he met me.

Q. Where did you see him?

A. At my home.

Q. And you discussed Sarubbi in your home?

A. He told me that the meet was because we were going to discuss Sarubbi, and "I thought it over and thought [fol. 315] maybe you will do me a favor. The doctor being so close to you, suppose you suggest it, so it won't make me look bad in front of Neal."

Q. What did you say to that?

A. I said: "I will do it."

Q. How long did the meeting take place?

A. Right after that we went to Longchamps.

Q. At your house, did you have any further conversation about Aurelio?

A. I don't believe we did.

Q. It was just about Sarubbi?

A. I believe it was just about Sarubbi.

Q. And then up at Longchamps you continued to talk about Sarubbi?

A. Yes.

Q. How long had Sarubbi been a leader?

A. Well, I imagine just a few years.

Q. And he had supported Kennedy?

A. Supported Kennedy, yes.

Q. At your request?

A. At my request.

Q. And went down the line for him?

A. Yes.

Q. Shifted from Fay to Kennedy?

A. Yes.

Q. At your request?

A. Yes.

Q. A good friend of yours?

A. That is right.

Q. For many years?

A. Yes, four or five years.

Q. You were willing to ease him out on Kennedy's request after he had been sick only a few weeks?

A. Now, don't misunderstand me. There was not a case of my easing him out. He wanted to ease him out.

Q. He wanted to use you as an instrument?

A. If he didn't use me he would do it himself.
[fol. 316] Q. Didn't you give him an argument?

A. I did—at my home. He said: "The district is going to hell. I need a new leader. I want to build the organization up. I can't have leaders—he is a doctor, you know."

Q. Didn't he approve of doctor's being leaders?

A. Well, you will have to ask that of Mr. Kennedy.

Q. You didn't give Kennedy any argument?

A. Yes, I told him the man went along with you—

Q. But he convinced you—

A. He said, "Well"—

Q. To ease him out?

A. He said: "If you do it for me, I will appreciate it. If you talk to him—" All the while I know, talking to the doctor, he wouldn't resign anyway.

Q. But it was just a play, as far as you were concerned?

A. That is right.

Q. What was said at Longchamps about it?

A. I was the one that brought the subject up.

Q. What happened when you brought it up?

A. I said: "The reason we are here, I would like to discuss Dr. Sarubbi. The fellow is sick. He isn't capable of being a leader right now. The district is going bad." Of course, Mike Kennedy chimed in and said: "Yes, I was going to suggest it myself."

Q. What did Neal say?

A. Neal said: "I do not think it is the right thing for you to do."

Q. Meaning Kennedy?

A. Yes.

Q. And did he say: "I don't think it is nice for you to suggest it, Frank"?

A. Well, I said: "He is my friend and he is a doctor." I gave them some sort of story, knowing all the while, [fol. 317] in my heart, if I spoke to the doctor, he wasn't going to resign anyway.

Q. How did Stand feel about this?

A. I don't believe Stand did much talking at all there.

Q. Did Kennedy agree that Neal was correct?

A. Well, I don't know. I just don't remember how we really wound up. I know I wound up with the contract of telling the doctor to resign.

Q. Did you get him?

A. No, I never—

Q. Did you talk with him?

A. No.

Q. He is still the leader?

A. He is still the leader, and we never brought the subject up.

Q. Now, Mr. Costello, you got to that restaurant at 11:35. Stand and Neal were there at the same time. Kennedy came at 12 o'clock. You were in animated conversation for over two hours, arguing with one another, and shaking your fingers at one another for all that period of time. Your argument was quite heated. Now, isn't it true that you have made up this little story because you heard that Kennedy gave the same yarn to the Grand Jury?

A. No.

Q. Didn't you talk about Aurelio at that meeting?

A. No, sir.

Q. Didn't you have an argument about Aurelio at that meeting?

A. No, I never had an argument with Mike Kennedy, Clarence Neal, or Bert Stand, in my life.

Q. And you would be surprised if they dared argue with you?

A. No, I wouldn't be surprised but I don't remember ever having an argument.

Q. You don't. I think I can prove that you did have one. But that is your story as to what happened at Longchamps?

A. That is right.

Q. You remember on the same day, before you got to [Vol. 318] Longchamps, speaking to Stand? Do you recall that Kennedy telephoned you and said: "Make it for 11:30"?

A. That is right.

Q. Then you called Stand and told him to call Clarence Neal and tell him to be there at 11:30?

A. That is right.

Q. And also call Mike and tell him?

A. Because I was busy.

Q. Of course, Mike knew about that but that was to carry out the scheme?

A. That is right.

Q. Now, do you remember Stand calling you back and reporting that he had done these things?

A. Yes.

"Costello: Hello.

Stand: It is okay for 11:30. I might as well tell you he is still in that frame of mind. He feels he has to do something for Fay."

Now, that refers to Kennedy, doesn't it?

A. Yes, it would refer to Kennedy.

Q. And it is Stand telling you that Kennedy is in the same frame of mind; that he wants to do something for Fay, and that meant that he wants to do something for Byrnes who is Fay's candidate; is that so?

A. It would mean that, yes.

Q. As you didn't say anything to Mike when he got to your home about his veering to Fay, doesn't that refresh your recollection?

A. Was that conversation the same morning?

Q. That was 9:03 in the morning, four minutes after you passed on Kennedy's conversation to Stand and eight minutes after Kennedy told you—

A. Well, I might have reminded Mike before the other conversation. I might have reminded him about Aurelio.

[fol. 319] Q. You said: "I understand you are planning to go along with Byrnes."

A. Yes.

Q. What did he say?

A. He said: "I'm going to go along with Aurelio."

Q. So you did discuss it that morning?

A. Yes.

Q. Did you discuss it at Longchamps?

A. No.

Q. Because then you were positive that you had it?

A. Yes.

Q. Now, do you recall speaking to a man by the name of Burke the following day?

A. Burke?

Q. Yes.

A. Who is Burke?

Q. That is what I want to know. This is one that I can't help you on. Suppose I read it to you.

A. Yes.

Q. Mr. Burke asks for Mr. Costello. I guess Mrs. Costello was on the wire.

"Hello.

Burke: That date is okay for three."

I presume three o'clock.

"Costello: Does Jimmy know?

Burke: I have told Max (or Mack) to tell him.

Costello: I'll see you over there.

Burke: I got a date with Bruce's man for 12.

Costello: Fine.

Burke: You want me at three?

Costello: Suppose you call Max (or Mack) up. He needs all the help he can get. You can be loyal to a certain extent.

Burke: Okay, I'll get in touch with him and if he wants me, I'll go."

[fol. 320] Does that refresh your recollection?

A. No.

Q. Did you see Fay about that time?

A. No.

Q. That conversation doesn't ring a responsive chord in your memory?

A. No.

Q. The following morning you got up, Mr. Stand was there on the telephone. Do you remember Stand calling you up and telling you that things were still up in the air even after you had these two additional commitments from Kennedy?

A. He might have.

Q. This is Thursday, August 19th, the same day that you had the party at the Martinique night club.

A. Yes.

Q. Let me see if this doesn't refresh your recollection.

"Stand: I put him to bed last night."

That will mean Kennedy, wouldn't it?

A. Well, I don't know. Read it to me.

"He was groggy. His last was Byrnes is out, Gavan is in. He claims he met Foley and Glennan and that's what they finally decided on, but I think different. I know he met Mahoney, the coal man. He more than likely put the Irish pressure on.

Costello: Well, I got Jimmy to one side and had a talk. I converted him. Do you know if he saw Mike later?

Stand: I don't know, but we have to stand pat.

Costello: I agree or else we will have the worst scandal you ever heard. It seems as though the whole thing is strictly Irish.

Stand: It looks bad. All that stuff about letters and calls from Washington is strictly the bunk. He's [fol. 321] sore that Jimmy didn't come to him first instead of coming to you and Clarence. The best thing you can do is to have Clarence go to him and tell him that is the way it has to go.

Costello: I expect him to call me. What about Higgins?

Stand: I'll talk to you later on that."

Do you want to explain that to us in your own words?

A. That was on the 17th you say?

Q. The 19th, the morning of the day you celebrated at the Martinique.

A. Well, I really don't know how to explain that. I will admit to the conversation.

Q. Let me try to help you. Isn't it true, Mr. Costello, that in addition to wanting Aurelio and in addition to getting promises, repeated promises from Kennedy, that Aurelio was all right, you were also anxious to have Byrnes on the ticket as a favor to your friend Fay? Isn't that right?

A. No, it isn't right.

Q. Well, what do you mean then when you said: "I got Jimmy to one side and had a talk. I converted him." That means Fay?

A. No.

Q. Who does it mean?

A. Well, I'm trying to think.

Q. All right.

A. I don't believe it can mean Fay because Fay never spoke to me on this subject. I got this Byrnes from either Clarence or Bert Stand.

Q. Well, now, but you knew that Fay was supporting Byrnes?

A. Yes.

Q. And Neal and Stand wanted the ticket to be Peck, Aurelio and Byrnes; isn't that so?

A. Neal and Stand?

Q. Wanted the ticket to be Peck—that is the Republican—Aurelio and Byrnes; isn't that right?

A. I believe it was right, yes. Instead he put Gavagan in there.

[fol. 322] Q. You were a little afraid that the ticket was going to be Peck, Byrnes and Gavagan?

A. And not Aurelio.

Q. And not Aurelio?

A. Yes.

Q. That's why you said the whole thing is strictly Irish?

A. Yes.

Q. Because the day before Stand had told you that he feels he has to do something for Fay—that meant Byrnes?

A. That is right.

Q. And the next day he told you that Gavagan is in—Presidential pressure—Roosevelt was for him?

A. Yes.

Q. And you knew Gavagan was going in and you were a little bit afraid that Fay, Chairman of the Executive Committee, was going to ease Byrnes in, too?

A. Yes.

Q. And then Aurelio would be out in the cold?

A. Yes.

Q. And that is what Stand meant when he said to you, "the best thing you can do is to have Clarence go to him and tell him that is the way it has to go"?

A. Yes.

Q. And you did tell Clarence to tell Kennedy, by that, "that is the way it has to go"—Aurelio?

A. I probably told him: "You made me a promise and you can't break your promise as a leader."

Q. When you said: "I expect him to call me later," that was Kennedy, wasn't it; and you saw Kennedy that day before you went to the Martinique, didn't you?

A. Yes.

Q. And Kennedy told you, "All right. I wish to hell I never had this job. I had all sorts of troubles and headaches, but I'm going along with Aurelio."

A. Yes.

Q. And then you got in touch with Judge Aurelio. You telephoned?

A. No.

Q. How did he happen to come to the Martinique?

A. I had a dinner appointment with Judge Savarese at the Martinique and I called Aurelio and invited him to the [fol. 323] dinner. I said: "Bring, also, Abe Rosenthal with you."

Q. Did you invite Kennedy and Stand to drop around too?

A. No. We will come to that later.

Q. All right.

A. He said: "I don't know if I can have Abe there because there was a club meeting, but I will try." I said: "Even if it is for an hour." He said: "All right." So my appointment was with Savarese, myself and Judge Aurelio for dinner.

Then I'm at the Ritz Bar and Kennedy walked into the bar at the Ritz with Bert Stand—oh, no. I had made an appointment with Clarence Neal. He and I were to have a drink and then they walked into the bar, which is Kennedy and Bert Stand, and I told them: "I'm having dinner. Will you folks join me for dinner?" They said: "No, we all have meetings tonight." I said: "Just come down even for a cocktail. I'll have Judge Aurelio and Judge Savarese."

Q. And they came?

A. That was the invitation.

Q. That was the invitation?

A. Yes.

Q. And they were there while Aurelio and Rosenthal were there for a short time?

A. Aurelio and Rosenthal got there ahead of me and Neal was there and then while I'm there a few minutes, Savarese came down and then Kennedy and Bert Stand.

Q. And you told Aurelio at that time that he was in?

A. No, I didn't tell him that at all.

Q. Did Kennedy tell him?

A. Kennedy shook his hand—"Let's not talk about this no more." In other words, he let him understand that he was in.

Q. You congratulated him—everybody congratulated him?

A. Well, it wasn't a case of congratulations, but we felt he was a nominee.

[fol. 324] Q. And he thanked you? Did Aurelio thank you for your help?

A. Not that particular night, no.

Q. By the way, here is a conversation I wish you would explain. It is a conversation with Kelly two days before the convention.

"Kelly: Did you speak to that—"

The conversation first is about his kidney trouble.

"Did you speak to that fellow?

Costello: Who?

Kelly: Harry Brickman.

Costello: Clarence did.

Kelly: Will he be there tonight?

Costello: Clarence told him to be over.

Kelly: We have him on the committee.

Costello: He will be there.

Kelly: Are you going golfing today?

Costello: Yes. Did you speak to Louie?

Kelly: Yes. He is not notified as yet.

Costello: He is all right.

Kelly: He will have to be notified for the meeting.

Costello: Call Mike up and find out.

Kelly: He is in the country.

Costello: Call Bert then.

Kelly: Okay."

Now, what Louie does that refer to? The Louie who was not notified as yet, with respect to whom you suggested [fol. 325] that Kelly call up Mike and find out about it. Did that have reference to Louis DeSalvio, the assemblyman, or Louis Capozzoli?

A. I don't know. I just couldn't tell you, Mr. Hogan.

Q. How about Brickman, do you know anything about him?

A. Yes, but that conversation I just can't figure out. Whatever it is, I know it is an innocent conversation.

Q. Brickman—

A. Brickman is in his district.

Q. He was trying for the leadership himself?

A. Trying to get half of the district.

Q. And Neal spoke about him at your request, Brickman decided to bury the hatchet, is that about it?

A. Yes, temporarily bury the hatchet, because Kelly is a sick man also and eventually he will want to give up half of the district and you can work harmoniously both of you.

Q. Is the understanding that Brickman gets the district after Kelly is completely incapacitated?

A. Yes.

Q. Is that the arrangement that you made with Brickman?

A. Yes.

Q. And you have known Brickman for some time?

A. Well, I've known him a short period.

Q. But he didn't need to come to you through somebody?

A. No.

Q. Now, another conversation. This is the day of the convention, August 23rd, and it is Jimmy again, and see if this doesn't refresh your recollection.

"Jimmy: Hello, Frank. How about having lunch with you this week.

Costello: Sure. Did Clarence call you?

Jimmy: Yes, Saturday.

[fol. 326] Costello: Well, you have nobody to blame but yourself.

Jimmy: I know, but you know how I brought him along.

Costello: You made a bad guess and I a worse one. Hell. He's such a nice man. I'd rather have my arm cut off than what happened.

Jimmy: I know.

Costello: I had a terrible run-in with that fellow.

Jimmy: I know.

Costello: Call me later in the week, and you and that other fellow can have lunch with me, say Wednesday or Thursday.

Jimmy: Okay, Frank."

Wasn't that Fay?

A. No.

Q. Who is that?

A. That must have been Jimmy Kelly.

Q. Who is the person that is such a nice fellow you would rather have your arm cut off than what happened? Was Kelly by any chance pushing Capozzoli for this job?

A. No, he was not.

Q. What did you mean when you said: "Well, you have nobody to blame but yourself: You made a bad guess and I a worse one."

A. I know he was pushing Capozzoli for City Judge.

Q. For City?

A. Yes.

Q. But that didn't come up at this convention.

A. No, but they thought that Byrnes was going to get the Supreme Court.

Q. Oh, then, Kelly was interested because if Byrnes had obtained the Supreme Court nomination—

A. There would be a vacancy.

[fol. 327] Q. Capozzoli would have gone to the City Court?

A. Yes.

Q. And because Kelly was close to you, you were urging Kennedy to take Byrnes rather than Gavagan?

A. No, no, I never had urged Kennedy in that particular.

Q. Aurelio was your only person?

A. That's right.

Q. Then, of course, that would explain this sentence: "Well, you have nobody to blame but yourself."

A. That's right. Kelly might have spoken to me about Capozzoli. When he heard about Byrnes, I said: "Why don't you go to see him," and he neglected it, or something.

Q. You meant by "such a nice man" that Capozzoli is a nice man?

A. Yes.

Q. "I would rather have my arm cut off than what happened." Then, I had a terrible run-in with that fellow—that would have been Kennedy?

A. I don't know if that was Kennedy, because I didn't have no run-in with him.

Q. Didn't you perhaps have reference to the fact that you had to argue a bit with Kennedy and had to lay down the law to him with respect to Aurelio?

A. I didn't lay no law down. I just told him to keep his word. A contract is a contract. I wouldn't call it an argument.

Q. Well, maybe time has mellowed your recollection with respect to it, but Stand was telling you all these things, and isn't it a fact that you were firm and that you insisted that he keep his promise?

A. Yes.

Q. Now, on the 24th, the morning after the convention, you recall that Judge Aurelio telephoned?

A. Yes.

Q. And you called him Tomasso and he called you Francesco, and he said "thanks for everything," and of course he meant what you had been doing for him in connection with this nomination. That's clear and plain.

A. That's right.

[fol. 328] Q. You understood him to mean that?

A. Yes.

Q. And you said: "Congratulations. It went over perfect. When I tell you something is in the bag, you can rest assured." Now, when did you tell him that something was in the bag? Sometime before that?

A. Well, now, that's on the morning of the 24th?

Q. Yes.

A. I really don't recall using the expression "it is in the bag," but if I did I meant it in a different light entirely. Being the Thursday prior, which was the Martinique dinner when Kennedy shook hands with him—well, it is naturally an expression you probably use at a race track. Well,

if the man has got Kennedy behind him and the promise of the Republicans, it is practically in the bag.

Q. Perhaps you said it because Aurelio came to you that night, after he stayed at the Martinique for three or four hours, and he stayed until Rosenthal came back?

A. Yes.

Q. And you talked to him at length during that period?

A. Not politics.

Q. You didn't deliberately avoid politics?

A. I don't know if we spoke any too much on politics.

Q. I am suggesting perhaps that he might have said to you some time during the evening "do you think everything is all right? I hope Raimo or Capozzoli—"

A. Yes, that might have happened after Kennedy left.

Q. And you said to him: "Listen, why don't you forget worrying about it"?

A. Forget about it.

Q. So it may have reference to that?

A. Yes.

Q. Then he goes on to tell you how it was done: Arthur Klein did the nominating, first me, then Gavagan, then [fol. 329] Peck and the doctor called him last night to congratulate him—now, that would be Sarubbi?

A. Yes.

Q. And then he tells about the doctor planning to go to Hot Springs, and you say: "Yes, that's the plan." Then he said: "Joe Loscalzo congratulated me," and he said: "that's a fellow you really should do something for. He certainly deserves something," and he had probably suggested that to you before that, hadn't he?

A. Yes.

Q. And Joe is a good friend of his and if you can help him out with anybody that he knows in Queens, it would be greatly appreciated?

A. We had spoken about him.

Q. Did you tell Judge Aurelio that you had tried to help Loscalzo to get him the District Attorney's nomination?

A. No.

Q. Did you tell him that you had sent him to Kennedy in connection with his wishes to be the leader out there?

A. No, not that I recall.

Q. But after the suggestion was made by Aurelio, you agreed if you could do anything through Kennedy or anybody else to advance his fortunes, you would do it?

A. Yes.

Q. And that is what you had in mind when you said: "Well, we all will have to get together, you, your Missus, Joe and myself and have dinner some night real soon"—get better acquainted?

A. I didn't have that in mind at all. What I had in mind was that at the Martinique dinner, Aurelio spoke of Joe Loscalzo that he wasn't making any headway as a district attorney there, that he should practice law, and he probably thought I could put a lot of law work in his way. [fol. 330] Q. Did you tell him that you could?

A. I didn't tell him that I could, but he is probably under the impression that maybe I could give him some cases, of some kind.

Q. What did you say to that suggestion?

A. Well, I might have said: "If I can help him, I will gladly help him."

Q. Now, do you recall Rosenthal telephoning you shortly after Aurelio?

A. Yes.

Q. And he thanked you further, didn't he?

A. I believe I met him.

Q. But I mean over the telephone he thanked you?

A. Yes, that's right.

Q. And he asked where he could see you because he had plenty to talk over with you, and you said: "Come up to my lawyer's office"—the office of Morris Ernst?

A. That's right.

Q. And you did see him up there?

A. Yes.

Q. Now, what was the "plenty" he had to talk over with you?

A. Well, the "plenty" was that he told me how enthused the Judge was, and how he appreciates it, because it is his district, and not only that but because it gives him an opportunity of getting himself a secretary or attendant's job.

Q. Did he mention his name?

A. No, he didn't mention no name.

Q. Did he ask if it was all right with you if this chap was appointed?

A. He thought I would—

Q. Put in a word with Kennedy?

A. Yes.

Q. And you promised to do it?

A. No, I didn't promise.

Q. You didn't tell him you would not do it?

[fol. 331] A. I didn't promise it. I told him I didn't want to butt in with that, for the simple reason that I thought Sarubbi had somebody.

Q. You didn't say Yes and you didn't say No.

A. That is right.

Q. Did you say anything to him about Sarubbi having a candidate?

A. No.

Q. Well, at the time he probably mentioned the name of the person that he had in mind, didn't he?

A. No, he didn't mention any name to my recollection.

Q. Now, you had not seen Sarubbi in some time, do you remember? He was sick.

A. That is right.

Q. And he was not only sick but he was on the way out, isn't that right?

A. That is right. Well, he wasn't—he was and he wasn't.

Q. You knew what Kennedy had in store for him.

A. That is right.

Q. A beautiful future.

A. That is right.

Q. When did you find out that Sarubbi had a candidate for attendant to a judge that had not even been nominated?

A. I think Dr. Sarubbi has a son-in-law who is a lawyer; and months and months prior to that he always talked about getting his son-in-law a job.

Q. As secretary?

A. Yes.

Q. There are distinctions between a secretary and attendant.

A. I don't remember if Mr. Rosenthal spoke about an attendant or secretary.

Q. In any event, Rosenthal came to you and asked you to say a good word for one of his election district captains for the position of attendant to Judge Aurelio.

A. Yes,—something.

[fol. 332] Q. You didn't tell him about Sarubbi?

A. No.

Q. You indicated if Kennedy approved it, it was all right with you?

A. That is right.

Q. Now there is a conversation on the 25th of August, that is two days after the Convention, between yourself and Stand:

"Good morning, Bert.

Stand: I had a call from Max yesterday. He wants to know when I will see him.

Costello: You will see him today?

Stand: Yes, we have a date for this morning, haven't we?

Costello: Yes.

Stand: It is for 10:30 at 59th Street.

Costello: O. K. I will be over there."

Do you know who that would refer to—Max?

A. That is two days after?

Q. Yes.

A. No, I wouldn't know, but I know I did meet him.

Q. You did meet Stand?

A. Yes.

Q. At 59th Street? Where would that be—"O. K. for 10:30 at 59th Street"?

A. That would be on Madison Avenue. Yes, 59th Street, Longchamps, but we went down and we had breakfast in Child's instead, but I met him at 59th Street.

Q. What did you have to talk over with Stand there?

A. That was right after this thing blew.

Q. No, that was before, Mr. Costello. My statement was August 28th. This was August 25th.

A. I don't recall that.

[fol. 333] Q. Let me try you on one more: The next day, August 26th, still two days before my statement. Bert Stand called Frank Costello:

"Bert: I'm going to meet that fellow at 9:30 o'clock. Where do you want us to meet you, at your house?

Costello: Where are you meeting him?

Stand: At the Biltmore.

Costello: What time?

Stand: 9:30.

Costello: All right, meet me there.

Stand: Which entrance?

Costello: 43rd Street side."

Whom did you meet with Stand at the Biltmore a couple of days after the Judicial Convention?

A. I don't remember that, Mr. Hogan.

Q. You haven't any recollection?

A. No.

Mr. Hogan: All right.

The Foreman: Mr. Costello, will you please come back here Wednesday of next week, same time, two o'clock.

The Witness: Thank you.

The Foreman: Thank you for coming down.

(Witness Excused.)

[fol. 334] People v. John Doe

October 20, 1943

FRANK COSTELLO, recalled as a witness, having been first duly sworn, further testified as follows:

By Mr. Hogan:

Q. After your last appearance before the Grand Jury, the press reported your lawyer as saying that you were not asked to sign a waiver of immunity. Do you recall that I did ask you that the first question and you refused?

A. That's right.

Q. And you feel the same way about signing a waiver today?

A. That's right; yes, sir.

Q. Now; on Wednesday of last week, I asked you this question, "When did you see Kennedy last", and your answer was, "I saw Kennedy about a week ago." Now, do you recall whether you saw him?

A. Yes, sir.

Q. Where was that?

A. At his office.

Q. That would be two weeks ago you saw him in his office?

A. That's right.

Q. How did you happen to go there?

A. Well, I had been trying to get in touch with Kennedy since this thing broke. I am giving you this story my way now, Mr. Hogan.

Q. Sure.

A. Knowing that I don't know what it's all about and I want to find out what the wrong was. I know I've committed no crime and it seems that I couldn't get in touch with him so I want to know what it's all about and went up to his office and discussed the whole thing. I said what is it all about.

[fol. 335] Q. Yes?

A. Where is the harm if there is no harm by my talking for Aurelio and having a misdemeanor record, as you would call it, going back twenty-nine years ago, I said then I am guilty of doing something, but outside of that I don't know of anything else. Now, we met; we spoke. We met in restaurants and so forth and so on. All of a sudden you are playing—you are playing a duck for me. What is it? Who's committed a crime?

Q. In other words, you had a general discussion of this matter with Kennedy?

A. That's right.

Q. Was anybody else present?

A. Yes.

Q. Who?

A. Mr. Stand.

Q. Yes?

A. I asked him the same question.

Q. Yes?

A. And Mr. Neal.

Q. Right. Now, did you see Kennedy on any occasion other than the one you described since I issued my statement?

A. No, sir.

Q. Did you see Stand at any time other than that?

A. Well, I have answered that last week. I believe I have seen him once or twice after that.

Q. And where did you see him?

A. Well, I told you we met in a restaurant.

Q. This is after I had issued my statement?

A. Once after you issued the statement.

Q. In what restaurant?

A. And prior to that I met him at the Biltmore.

Q. Yes; but at the restaurant—

A. Restaurant—Child's Restaurant.

Q. That was after the convention and after I issued my statement so that you saw Stand twice since August 28th and Kennedy once?

A. That's right.

[fol. 336] Q. Did you see Aurelio?

A. No.

Q. Did you communicate with him?

A. No, sir.

Q. Did your lawyer see him?

A. No, sir; not to my knowledge.

Q. You told us last week that Kennedy came to you before he was elected leader and asked for your help?

A. That's right.

Q. Or several occasions he came to your apartment; then you saw him at the Madison Hotel for lunch one day?

A. That was my first meeting.

Q. And you gave him your telephone number. He called you several times asking if the situation had changed, right? Now, was anybody with him when he came to your apartment?

A. I don't believe there was.

Q. Just you and he?

A. Yes.

Q. Well, did anybody other than Kennedy ask you to support Kennedy during that period?

A. Not to my recollection.

Q. How often did you telephone Aurelio in the last five or six months?

A. Once. Just that one time, I believe, to make the appointment for that Martinique dinner.

Q. Now, I suppose he got your telephone number from Rosenthal; is that it?

A. Well, he might have and then I might have given it to him myself, but he didn't call me at that particular time. I called him.

Q. Do you have a recollection of giving your telephone number to him?

A. No, I haven't.

Q. So that you called him on one occasion and that was to invite him to the Martinique and then you told him to bring Rosenthal with him?

A. That is right.

Q. Now, did you ever speak to Mrs. Aurelio on the telephone?

A. I don't believe I did.

[fol. 337] Q. You didn't telephone Aurelio the night of the convention, did you?

A. I don't recall. I might have, but I just don't recall.

Q. Well, your best recollection is that you didn't, isn't that true?

A. At present, yes.

Q. And you would recall it if you did, wouldn't you?

A. Well, I imagine I would.

Q. Now, Mr. Costello, Mr. Rosenthal has testified that at the Martinique you advised him that George Thompson, a leader of the 12th Assembly District, and Isidore Greenberg, a leader of the 17th Assembly District, wouldn't be recognized by the executive committee the following week. Do you recall that?

A. No.

Q. Did you have such information at that time?

A. No. I don't know either gentleman—Greenberg or Thompson.

Q. You don't know Thompson?

A. No.

Q. There is a Thompson who telephoned you occasionally; that is not George Thompson?

A. No.

Q. Who would that be?

A. It might have been—I have a friend by the name of Jimmy Thompson.

Q. In any event, you have no recollection of telling Rosenthal that those men were to be eliminated?

A. No, sir.

Q. Do you recall Aurelio speaking to you at the Martinique about Raimo and Capozzoli and the possibility that either one of them might ease him out of the picture?

A. No.

Q. You have no recollection of that conversation?

A. No, sir.

[fol. 338] Q. Now, we mentioned a number of leaders last week. Do you know other Democratic leaders, I mean leaders other than the ones we mentioned. Do you know Congressman Gavagan?

A. I have met him just once.

Q. Where was that?

A. At Rosenthal's daughter's wedding.

Q. Do you know Senator Buckley?

A. I met him once at Saratoga race track.

Q. Who introduced you?

A. I believe Mr. Kennedy.

Q. Was that before he was leader?

A. No, it was after he was leader.

Q. But you didn't see Buckley or Gavagan in connection with the Judicial Convention at any time?

A. No, no sir.

Q. Did Senator Buckley speak to you by any chance about supporting Kennedy?

A. No.

Q. I ask because I think Buckley was his campaign manager.

A. No, I never knew Buckley until after he was—Kennedy was leader.

Q. Has Mr. Kennedy written any insurance for you, Mr. Costello?

A. No, sir.

Q. Did Mr. Stand ask you to give him some insurance at one time?

A. Yes, he did.

Q. What did you tell Stand?

A. I says, well, if I hear of any insurance—I personally have none to give—I will recommend it, which I never did. I never had the occasion.

Q. If you had heard of it, you would have?

A. I probably would have, yes.

Q. And if you had any to give yourself, you would have given it to him?

A. That is right.

Q. Did you tell that to Kennedy also?

A. Oh, yes.

[fol. 339] Q. And he said, if anything does come along, why he'd be happy to get it?

A. Yes.

Q. You recall testifying before the Federal Grand Jury in August, of 1939?

A. Yes.

Q. You remember there was a Mr. Young and a Mr. Doyle, Assistant United States Attorneys, questioning you at that time, and also Mr. Cahill?

A. I remember Mr. Doyle.

Q. Now, this is a question and answer taken from that examination which I have here. The question is:

“Mr. Costello, you were telling us about your activities in the Pelican Novelty Company. I ask you if that is the only business activity that you have been interested in in the years 1935 to date.”

and the answer is

“Yes, sir.”

Now, was that the truth at that time?

A. From what year was that, Mr. Hogan?

Q. 1935 to 1939.

A. I believe it was, yes.

Q. You gave that answer and it was the truth that you were in the slot machine business from 1935 to 1939?

A. Well, the vending machine. I would call it mint vending machine.

Q. Well, that has been referred to as slot machines, also.

A. Well, I don't know what you call it, Mr. Hogan, I know we have a law and it is legal and it gives mint, just like Wrigley chewing gum machines.

Q. Gives money too, doesn't it?

A. No, sir.

[fol. 340] Q. Doesn't it give slugs that are exchanged for money?

A. Slugs to play for fortunes and what not.

Q. And don't the store keepers cash those slugs too?

A. Well, I don't know that. I am not a store keeper.

Q. Well, in any event that was the truth at that time?

A. Yes.

Q. Except for gambling activities which, I think, you also admitted here?

A. Yes.

Q. Admitted as a matter of fact that you were a book maker in 1931 and 1932?

A. No, I never admitted that.

Q. You did not?

A. No.

Q. You didn't testify that you made book in 1931 and 1932?

A. No, I might have testified that I was a commissioner.

Q. What do you mean by that?

A. Well, I probably take your bet and give it to a book maker. That don't make me a book maker—commission broker.

Q. You'd get a—

A. A commission.

Q. A commission?

A. That is right.

Q. Then would you say you were an agent for a book maker?

A. That is right. I would call it an agent.

Q. Do you recall that in 1935 you were arrested by Federal authorities with Noel Scaffa and some others?

A. Yes, sir.

Q. Do you remember your attorney, Moses Polakoff, saying at that time with reference to you that you were engaged in book making at the track and continuing to say "If he plies the vocation honestly, it is not to be held against him".

A. He might have said that not with my privilege because I was never a book maker.

[fol. 341] Q. You mean you didn't accept bets at the track?

A. That is right.

Q. But you did accept bets and pass them on?

A. That is right, as a commissioned broker.

Q. Well, did you add any business activities to these vending machines after 1939? Did you go into any other business?

A. After 1939, no sir.

Q. So that you were still in that business, is that right?

A. What business?

Q. In the vending or slot machine business?

A. That is this year? Yes, yes.

Q. And you aren't in any other business?

A. No.

Q. And you don't have any interests in any other business?

A. No.

Q. You were asked before this Grand Jury if you had an interest in the Alliance Distributors and your answer was no. Was that true at the time?

A. It is still no.

Q. And it is still true and you were asked before this Grand Jury if you had an interest in the Whittlesly Distillery Company, and your answer was no?

A. That is right.

Q. That is true still?

A. That is right.

Q. On May 17, 1939, you told Dennis McMahon, Deputy Collector of Internal Revenue that your only income was derived from the income of slot machines in New Orleans. Was that true?

A. Yes.

Q. So that you denied that you had any interest in the Alliance or Whitteley Distillery?

A. That's right.

Q. And haven't any present interest in liquor?

A. No.

[fol. 342] Q. Or a liquor distributing company?

A. No, sir.

Q. And you did not tell anybody that you had. Did you ever lie about it to anybody?

A. Well, if you—you want me to give my version?

Q. I want you to answer the question.

A. Well, I don't believe I did.

Q. You never told anybody that you had an interest in that distillery in Scotland?

A. I never volunteered in saying I had an interest.

Q. Well, you haven't any interest, have you?

A. No, sir, I haven't.

Q. And never told anybody you had?

A. Well, I never volunteered to tell them. What I mean by that is this: if you would ask me if I have an interest, I might pass it off in a way to let you believe I have one.

Q. Why?

A. Why? Because Phillip Kastel, which is a dear friend of mine, associate of mine; he represented the Whitteley Distillery Company.

Q. Yes?

A. He was the sole agent in the United States for that purpose.

Q. Yes?

A. And I was practically routing for him and if I thought that you would believe I had an interest and you would buy some liquor, I wouldn't hesitate in passing it off and let you believe it.

Q. But if I were not interested in purchasing liquor, you wouldn't tell that lie to me, would you?

A. Well, I don't know, maybe I might have; I might, in spite. I might have where I thought it would do some friends some good that they would buy some liquor.

Q. Did you get—

A. I don't remember saying it, but I might have.

Q. You don't remember?

A. I wouldn't hesitate.

[fol. 343] Q. Did you get any money from Kastel for pushing his interest at all?

A. No, sir.

Q. You don't recall telling anybody that you had an interest?

A. I might have.

Q. Well, isn't it more likely, Mr. Costello, that you would say, if asked; that Kastel, a very close friend of mine and business associate, is interested in the Whittleley Distillery Company and if you can put anything his way, I would appreciate it?

A. Might have said that.

Q. Isn't it more likely that you would say that than the other?

A. That's right.

Q. Now, you say that you never volunteered this but when people would ask you, you would recommend the products of the Whittleley Distillery, is that right?

A. That's right.

Q. Did you ever tell anybody that you had any trouble getting the stuff over here, getting liquor over here, that you had any trouble getting the stuff over here?

A. No, the chances are that someone would say he'd want a certain amount of cases and they spoke to the Alliance and Alliance would say, "Well, we can't give you but half of the amount," and if they want to use me as a recommendation or to talk for them, I would say, "Well, maybe they got trouble, they have trouble in getting it over, war conditions, and what not."

Q. That would be, if somebody was interested in purchasing liquor?

A. That's right.

Q. Now, Judge Aurelio never asked you whether you were in the liquor business, did he? A. Never.

Q. And you did not tell this to Judge Aurelio, did you?

A. Never.

Q. Did he ever ask you any business you were in—any business?

A. No, never.

[fol. 344] Q. You never told him that you were having trouble getting the stuff over here?

A. No.

Q. Never told him that you were having difficulty getting hops in your liquor business?

A. No, sir.

Q. Now, Mr. Stand testified that he knew you were in the slot machine business—you told him?

A. Well, that's public property, yes.

Q. You told him that?

A. Yes. Well, yes; if I didn't tell him, everybody else knows it. That's a legitimate business in Louisiana.

Q. And you also told Rosenthal that, I believe?

A. I don't remember telling him.

Q. You made no secret of it?

A. No, no secret whatsoever.

Q. As a matter of fact, you disclosed your business in your income tax report?

A. Surely.

Q. You never made a mystery of it at all?

A. No.

Q. Kennedy knew it?

A. I imagine so, yes.

Q. Kennedy was entertained by your associate in New Orleans, isn't that so?

A. I don't know if they discussed business, but I take it for granted that everybody knew.

Q. And it has been widely publicized in the press?

A. That's right.

Q. You have been referred to, rightly or wrongly, as the king of slot machines, isn't that right?

A. That's right.

Q. And that has received probably more publicity than you care?

A. I still call it a vending machine; we have a law in Louisiana. I want to emphasize that.

Q. You were in business, in that business, here in 1932, weren't you?

A. That's right.

Q. And you and Kastel continued in it until the raid of February 18, 1934?

A. That's right.

[fol. 345] Q. And what was the name of that business?

A. I believe it was Midtown.

Q. Well; there were two companies.

A. Tru-Mint.

Q. The Tru-Mint Corporation and the Midtown Novelty, two different names?

A. Yes.

Q. And you had an office at 1860 Broadway on the Eleventh Floor?

A. That's right.

Q. Rental \$150 a month?

A. I just don't remember.

Q. You also had space in the basement, I believe, for storage?

A. Storage room, yes.

Q. How many collectors did you employ?

A. I wouldn't, I can't answer them questions, Mr. Hogan.

Q. Well, I have a statement from your bookkeeper which says that you employed at least fifty collectors. Would that be approximately true?

A. Well, I wouldn't know.

Q. Were you there every day?

A. Well, no, I wasn't active at all. Very, very little.

Q. I have five witnesses, Mr. Costello, elevator operators, superintendent and janitor who say you were there every day and some evenings for long periods of time. Would you say that was false testimony?

A. Yes, it is. I tell you why, because I was in the building, I had an office in that building.

Q. On the eleventh floor?

A. Well either the tenth or eleventh, but it wasn't on the floor of the Midtown Novelty Company.

Q. Well—?

A. Whatever you call it.

Q. Well if you didn't go to the office of the Midtown Novelty—?

A. I had my own private office.

[fol. 346] Q. Well then Kastel could come to your office?

A. That's right, I believe I was on the 10th floor.

Q. So they could go back and forth any time they needed you?

A. That's right.

Q. And they did? Manny Kramer came to your office regularly, didn't he?

A. Yes.

Q. And Kastel came to your office regularly?

A. Yes. That was a different individual office though.

Q. But you were there? Was that office used for anything in addition to this slot machine business?

A. Well I just had an office for myself, I was doing a little gambling.

Q. What type of gambling would that be?

A. Race-horse.

Q. You mean just betting or were you taking bets also?

A. Just betting.

Q. You needed an office for that?

A. Well, I used it for many purposes, maybe to meet some people, something, didn't want to meet them out in the street.

Q. Well what would you have occasion to meet people for? For this machine business for one thing?

A. Well partly, yes.

Q. And for gambling?

A. Well I did my own business in there with the gambling business.

Q. How did you gamble—by telephone?

A. Well I might have settled and collected all my bets.

Q. The lease was signed by Mr. Jaffee. Do you recall that name?

A. Yes.

Q. Did he have an interest in the company?

A. No.

Q. Now you had other stores also at the same time, didn't you?

A. Yes I believe we had one on 27th Street.

Q. 148 East 27th Street?

A. I believe that's the number.

[fol. 347] Q. And didn't you have one also at 247 West 116th Street?

A. That's right.

Q. Did you have any stores other than those two?

A. I don't think so.

Q. What were those stores used for, if you please?

A. Well, they were sort of branch stores.

Q. Repairing machines?

A. Repairing machines, yes.

Q. Branch headquarters?

A. That's right.

Q. How many machines did you have in operation at any period?

A. Oh I just don't remember off-hand, maybe five hundred or so.

Q. Five hundred? And how many did you lose at the time of the raid? That probably is a sore recollection, you probably recall that?

A. Well I couldn't recall how many we lost.

Q. Quite a number?

A. We lost quite a number.

Q. Several hundred?

A. I imagine so, yes.

Q. The papers at the time said that something like seventeen hundred were seized?

A. Oh, no.

Q. Not that many?

A. No.

Q. You were never called to the District Attorney's office?

A. No.

Q. Never questioned by the police authorities?

A. No sir.

Q. Did you expect to be questioned at that time?

A. No, I didn't. Mr. Hogan I want to tell you at that time that you want to call it slot machines, I still call it vending machine it was legal also in New York.

Q. But there were a number of employees questioned by the police and the District Attorney, were there not?

A. I imagine there was, yes.

[fol. 348] Q. But you were not bothered?

A. No.

Q. Nor was Mr. Kastel?

A. No.

Q. Now the money was divided fifty-fifty with the storekeepers, was it not? Wasn't that the arrangement?

A. Well I don't know, I just couldn't give you the exact—

Q. Approximately?

A. Approximately, yes.

Q. And weren't your collectors instructed to tell the storekeepers to cash the slugs that the winning player would receive?

A. I don't know if they were or not.

Q. You wouldn't be surprised if collectors testified to that effect?

A. No, I wouldn't be surprised, no, but I never instructed anyone, never hired anyone.

Q. Well Mr. Kastel handled that, did he?

A. Yes.

Q. It is possible that he gave those instructions?

A. Possible. I don't know. You have to ask Mr. Kastel.

Q. Is he in town?

A. No.

Q. Isn't it true also that the collectors would be supplied with money to reimburse the storekeepers for money they paid out in exchange for slugs? Your collectors would come back with slugs, wouldn't they?

A. Well I don't know. I can't tell you much about that business.

Q. You don't know the business operations?

A. No.

Q. Was your telephone number on the slot machines in case of trouble?

A. Yes.

Q. And you would furnish bail bonds for those arrested?

A. I believe so, yes.

Q. And you paid the fines?

A. That's right.

Q. Did you hire lawyers for that too?

A. I believe we had lawyers, yes.

[fol. 349] Q. In 1933, according to Robert Horowitz, he Mr. Horowitz, wrote 150 bonds for storekeepers arrested

for possession of slot machines. Would that seem about right?

A. Well I couldn't tell you. The name is very familiar to me.

Q. Horowitz?

A. But I never hired him.

Q. But he was hired by one of your associates?

A. That's right.

Q. And Manny Kramer took care of that end of the business, didn't he?

A. Yes, he was the bookkeeper.

Q. Now, of course, you did use the office of the Midtown in addition to your private office, didn't you?

A. Well I used it to the extent of one, of say meeting Kramer or Mr. Kastel would come in and talk to me.

Q. As a matter of fact, there was a stationery die, wasn't there, with your name on it, the name Frank Costello at 1860 Broadway? Remember using that stamp?

A. Might have been. I just don't recall.

Q. And other people in the organization were authorized to stamp your signature on letters of one kind, were they not?

A. No.

Q. Who would have the stationery dies? There are two stationery dies found by the police, Mr. Costello—one in the name of Philip F. Kastel, 1860 Broadway, the other in the name of Frank Costello.

A. What do you mean by a stamp?

Q. A stamp with your signature and address on it that you would apply to absorb ink and then place it on a paper to give a facsimile of your signature.

A. I don't recall that.

[fol. 350] Q. Mr. Gelb suggests that contrary to my thought, it was a die used by a printer to make up letterheads. Do you recall there were letterheads with your name?

A. You are going back many years. I don't recall. I don't recall ever ordering them—the stationery—

Q. But you did see stationery there with your name on it?

A. I don't remember if I did or not. I won't say there wasn't but I just can't recall at present.

Q. Did you employ a person by the name of Mulrooney? Pierce Mulrooney?

A. No, sir.

Q. Can you give any explanation as to why letterheads and envelopes in the name of Pierce Mulrooney were found at 1860 Broadway? Do you know Mulrooney?

A. Yes.

Q. Isn't he, or wasn't he, at that time a member of Hines' organization?

A. That's Commissioner Mulrooney's cousin.

Q. Wasn't he a member of the Hines organization?

A. I imagine he was.

Q. Isn't he a person that was recommended to you by Jimmy Hines for a job at the Midtown Novelty Company?

A. No, he was never recommended to me.

Q. Did he work for you at anytime?

A. No. I have known the man for years. Just know him as a friend.

Q. Did he work for you at any time?

A. No, sir.

Q. There were various packages of currency found wrapped in green paper with the word "Nassau" on them. Does that indicate that you were operating in Nassau also?

A. It might have.

Q. You had machines in Nassau?

A. Believe we did at the time, yes.

[fol. 351] Q. Did you have them in Brooklyn also?

A. No.

Q. Well, who gave you the territory?

A. What do you mean who gave me the territory?

Q. First, how much territory did you have? You had New York, or Manhattan, rather, and Nassau. Could you also go into the Bronx?

A. Yes.

Q. You could put them anywhere that you found locations?

A. That's right. I had a permanent injunction. I had an injunction.

Q. Well, that is hardly responsive and we did hear that before. We know you had the injunction.

A. I mean so I could put them almost any place I wanted to.

Q. I mean you weren't restricted in territory by the Mills Novelty Company?

A. Mills, no.

Q. Could you put machines anywhere you found locations?

A. That's right.

Q. And you did have some in Nassau?

A. That's right.

Q. And you had collectors in Nassau?

A. That's right.

Q. Now, this was big business, wasn't it Mr. Costello?

A. Well, to a certain extent, yes.

Q. And you bought a great number of machines?

A. Yes.

Q. Do you recall in January of 1934 paying the Mills Novelty Company \$50,000 for machines?

A. I don't recall. I might have.

Q. Well, I have a photostat of a check made in favor of the Mills Novelty Company on January 24, 1934. You will note it says: "Charge Philip Kastel." Does that refresh your recollection on it?

A. No. I wouldn't deny it but I never—that's Mr. Kastel's.

[fol. 352] Q. But if he paid out \$50,000 he perhaps told you about it, didn't he?

A. Well, he probably did. You are going back 10 years now.

Q. It is not unlikely that he did pay that?

A. That's right.

Mr. Hogan: Mark it, please.

(Marked "Grand Jury Exhibit 1, as of October 20, 1943.")

Q. After the raid in February of 1934, did you continue operation at all?

A. No, sir.

Q. Between July and October of 1934, Mr. Kastel turned over to you at least \$40,000 checks drawn to your order. I show you those checks. Can you tell us—

A. These checks here, they are all exchange checks, Mr. Hogan. In other words, I was gambling. I have no bank account and I probably had to pay someone some monies and I'd say, "Phil, let me have a check for \$4,000. He would give it to me. That is a \$4,000 check and I give him \$4,000. These are all exchange.

Q. Would you give him cash?

A. Yes. It was an accommodation.

Q. For the face amount of the checks?

A. That's right.

Q. So that between July and October of 1943, if my addition is correct, you gave him cash in the sum of \$40,000?

A. That's right.

Q. And he gave you these checks?

A. That's right.

Q. Now, here's a signature. Can you tell me what that is?

A. No.

[fol. 353] Q. Is it your recollection that these checks were given to the persons whose names appear on the reverse side for gambling debts?

A. I imagine most of them, yes.

Q. I show you check dated July 18, 1934 and note Benjamin Levy's name on it. Is that a gambling transaction?

A. Yes, that must have been, yes.

Mr. Hogan: I think you can mark all of them as one exhibit.

(Marked Grand Jury Exhibit II as of October 20, 1943.)

Q. And check dated July 23, 1934 with the same scroll which has been suggested is the signature of an agent of Johnny Ferone. Did you gamble with Johnny Ferone?

A. He is a bookmaker. He was. He is now dead.

Q. Here is a check dated August 16, 1934 with the endorsement Max Kalick. Kalick was a bookmaker, was he not?

A. That's right.

Q. Would that represent a gambling transaction?

A. That's right.

Q. Check dated September 3, 1934 and the endorsement looks like Claude Tasey. Is that name familiar to you?

A. No. Might have been a gambling. . . .

Q. You don't know anything else it might be?

A. No.

Q. Check dated September 10, 1934, Benjamin Levy—again a bookmaker?

A. Yes.

Q. Check dated September 14, 1934, Benjamin Levy—also a gambling transaction?

A. I am trying to think who this Levy is. It must have been.

[fol. 354] Q. Check dated September 15, 1934, endorsement reads "Abe Hallow"—is he a bookmaker?

A. Bookmaker, yes.

Q. Another check dated September 15, 1934, endorsement is Benjamin Levy—again this might have been—quite a few transactions with Levy, so it must represent gambling debts, isn't that so?

A. That's right.

Q. A check dated September 21, 1934, Benjamin Levy again, that would also be gambling?

A. Yes, I imagine so.

Q. Check dated September 22, 1934, again Benjamin Levy—would you say that was money paid to Benjamin Levy, a bookmaker?

A. That's right.

Q. Check dated September 26, 1934, Ben Davis—that's a new name—do you recognize that name?

A. Benny Davis—that's a bookmaker.

Q. Check dated September 28, 1934, endorsement reads "T. J. Schorr, Special." That's Tom Schorr, is it?

A. Yes.

Q. Bookmaker?

A. Yes.

Q. Check dated September 26, 1934, endorsement Benjamin Levy—also gambling, correct?

A. That's right.

Q. And the check dated October 3, 1934, with the same scroll signature which it is believed is the agent of Ferone?

A. That's right.

Q. October 10, 1934, endorsement reads "Deposit to the account of C. F. Madden"—that would be Cole Madden, Coley Madden, a bookmaker?

A. That's right. That is, he was at the time.

Q. Isn't he now?

A. Well, you have got Mutuel now.

Q. There are bookmakers now?

A. I don't know.

[fol. 355] Q. You don't know that?

A. No.

Q. You would not ask us to believe that you don't know there are bookmakers, would you? How about your friend, Frank Ericson?

A. I would not say he was a bookmaker.

Q. He is taking bets?

A. But he puts them machines, so it is the same thing, isn't it.

Q. Here is a check dated October 16, 1934, the endorsement is Auditore—is he a bookmaker?

A. No, he is not.

Q. That's one that isn't then—\$2000.—what does that represent?

A. I probably loaned it to him. That's Johnny Auditore. I probably loaned it to him and he paid me back.

Q. What business is he in?

A. He is a stevedore.

Q. Got his own company?

A. Yes.

Q. Here is one for \$1550. dated October 17, 1934, and it is the same illegible signature—you believe that to be a gambling transaction?

A. Yes.

Q. And the last is the one to which we made reference first—October 25, 1934, \$4000. with the same signature—you believe that to be a gambling transaction, right?

A. That's right.

Q. Now, who owned the Midtown Novelty Company or Tru-Mint Corporation—which was the correct name?

A. Well, there were different companies, Mr. Hogan.

Q. Did you have an interest in both companies?

A. Yes. They called it Midtown because it was in midtown, and Tru-Mint was different.

Q. Tru-Mint was the parent company?

A. That's right.

Q. Midtown was the subsidiary which had a certain territorial allocation?

A. That's right.

[fol. 356] Q. Who owned the parent company then, Tru-Mint?

A. Well, I had an interest in it and Kastel.

Q. Kastel?

A. Yes, that's right.

Q. A man named Tarr, Louis Tarr?

A. Lou Tarr . . .

Q. Did he have an interest?

A. I really don't know if he had an interest or not.

Q. How about Tillotson, did he have an interest, M. F. Tillotson?

A. Tillotson . . .

Q. Doesn't he have an interest and didn't you buy out his interest in December of 1931?

A. Up in Tru-Mint I believe.

Q. Yes.

A. Yes.

Q. Now, did there come a time when you and Kastel owned the entire company?

A. Well, I don't know if you would call it the entire company or not. You just mentioned a fellow named Tarr. Now there was other people who might have had a certain amount of machines, might have had, say, fifty machines and used our office for calls, and etc. etc.

Q. But you and Kastel had the major portion or the major interest in the company?

A. That's right.

Q. After the raid in February of 1934 you did not operate machines in New York?

A. That's right.

Q. But you resumed operations in New Orleans thereafter?

A. In 1935?

Q. In 1935. And what was the name of that company?

A. That was the Pelican.

Q. Pelican Novelty Company. Now, how did you happen to go to New Orleans, Mr. Costello?

A. Just what do you mean—how did I happen to go to New Orleans?

[fol. 357] Q. Well, what prompted you to set up these machines in New Orleans?

A. Well, it is sort of a long story but Huey Long at the time was a United States Senator. He was a very dear friend of mine.

Q. You had known him for some years prior to that?

A. Yes; I knew him.

Q. Yes.

A. And he told me that—talking of these machines, he said, why not put them out in New Orleans. He said, I will pass some sort of a bill and get a certain taxation out of it for some sort of a fund.

Q. Yes.

A. Old Age or something. He says, How much could you fellows afford, you or your combination—which he meant Philip Kastel—as a taxation on these machines.

Q. Yes.

A. I said, "Well, I think we can afford about \$50 a year." He says, "well, if you can put out a thousand machines there, if I legalize it, that's \$50,000 a year that I can apply to some sort of fund". I just don't remember now, you are going back ten years.

Q. Yes.

A. And through his invitation I went to New Orleans.

Q. That was in 1935?

A. That's right.

Q. And Pelican Novelty Company was set up?

A. That's right.

Q. You and Kastel were interested in it, who else was interested in it?

A. Well, we have had other parties. We had Geigerman's; we had Moran.

Q. Was Moran interested in the Pelican?

A. Yes. Brauer the fellow is dead now.

Q. Now, Moran's correct name is Brocato, isn't it; Thomas Brocato?

A. That's right.

[fol. 358] Q. He has a criminal record, has he not?

A. Not to my knowledge.

Q. Didn't he serve time in Atlanta?

A. Not to my knowledge.

Q. What were your profits in 1935 do you recall?

A. Well, I just don't recall right off-hand.

Q. Well, it was a very good year, was it not?

A. Well, I presume it was.

Q. Do you recall that in 1936 you paid a tax on about \$79,000?

A. Yes.

Q. Now, did the old age people get any money?

A. No. Now, if you will let me explain I will tell you how that came about.

Q. All right.

A. When we got to New Orleans we set these machines out and before Huey Long could go in legislation with it, he was killed—died.

Q. Somebody succeeded him as Governor?

A. Yes.

Q. Or as Senator, I should say.

A. No, he was a Senator at the time.

Q. Yes. My mistake. And did you go to anybody at that time and say it was Huey's idea that money would be derived from these operations to support old age?

A. I don't believe I did. Frankly speaking, I think I took advantage of it and just let the machines out.

Q. And your profit in 1936, according to your income tax, was \$66,000—that is, your individual profits?

A. Yes.

Q. How much did you put up to start the venture, do you recall, Mr. Costello?

A. I just don't recall now.

Q. It wasn't a large amount was it?

A. It couldn't have been so much but I just don't recall.

[fol. 359] Q. You testified in 1939 it was about \$15,000, does that refresh your recollection?

A. Whatever I testified, I just can't recall.

Q. Was Seymour Weiss interested in this?

A. No.

Q. You do know him very well?

A. Very well.

Q. Have had dealings with him?

A. No.

Q. He visits you?

A. I have been a guest at his hotel, that's all.

Q. He visits you in New York?

A. Yes.

Q. He has a criminal record?

A. Well, I wouldn't say visit me. I visit him. He used to come here, stop at the New Yorker and I visit him.

Q. Was he convicted of a mail fraud in New Orleans?

A. Yes.

Q. These machines are so arranged, are they not, that the operators can't lose, isn't that true?

A. No, we have a certain percentage.

Q. Yes. So they are geared so that the operators are bound to receive a certain percentage of the money put in them?

A. That's right.

Q. And what percentage were you operating on in New Orleans?

A. Well, I couldn't tell you the percentage off-hand. I couldn't tell you the percentage unless I asked one of the mechanics that probably is acquainted with the machines more than I am.

Q. Didn't you know the percentage you were operating on when you put the machines in?

A. No.

Q. What is the usual percentage?

A. Well, I don't know, probably 18, 20 per cent.

Q. So that if a million dollars was put into the machine [fol. 360] the operator would be certain of getting \$200,000 back, if it were 20 per cent, isn't that right?

A. That's right.

Q. So to that extent it is no gamble in so far as the operator is concerned?

A. No more than it is gambling for your race tracks here that they took 15 per cent. It is on the same style.

Q. That's all right but the operators can't lose—they get 20 per cent back.

A. That's right.

Q. Weren't some of the machines, Mr. Costello, geared as high as 40 per cent?

A. No, I don't believe ours was ever that.

Q. But some of them?

A. Not ours.

Q. I mean some. You have heard of machines that are geared to that extent?

A. Well, I don't know. I never heard, but I know that ours weren't.

Q. Now, Mr. Kastel spends most of his time down there?

A. He is practically a native, yes.

Q. And how many times a year do you go there?

A. Twice a year.

Q. But you are in constant communication with him?

A. He calls me. I call him.

Q. And you advise him with respect to the purchase of machines?

A. No, he don't need me for advice. He runs the whole business there.

Q. Well, don't you look about for machines for him?

A. Look about?

Q. Yes.

A. Well never did until this year when they were not manufacturing any and I looked about where I could buy some second hand machines—inquired, you know, where I could get some.

[fol. 361] Q. I read you this conversation, for example, on May 27, 1943 with Joe Bruno. Joe Bruno is from New Jersey, isn't he?

A. That's right.

“Costello: Hello, Joe. How do you feel?

Bruno: It is the gall bladder that's bad. I guess I will feel better soon.

Costello: I hope so.

Bruno: That person called me and I don't know if they are available to sell now. There is something about the delivery.

Costello: He is holding out.

Bruno: Why not get in touch with Reading, Pennsylvania?

Costello: I will do that."

Q. Now, that was the conversation about these machines was it not?

A. That's right.

Q. And then on July 20, 1943, there is Irving calls you. Perhaps you can give us his last name?

"Costello: Hello.

Irving: Hello, Frank. This is Irving.

Costello: What do you know?

Irving: I got a call from a fellow out of town. He wants one hundred machines.

Costello: Where is he going to put them?

Irving: Out of town.

Costello: Where?

Irving: Somewhere in New England.

[fol. 362] Costello: I could use one hundred machines myself. We can't get the paraphernalia.

Irving: It's the same all over."

Q. Then some words about golf. Now, that has reference to machines also, has it not?

A. That's right.

Q. And that is part of your job, to get machines and to fix the price for their purchase, isn't it?

A. Not—well, not to fix a price. I am just trying to locate some machines and Kastell fixes his own price.

Q. Well, now let me try to refresh your recollection with respect to that testimony. On June 15, 1943, see if you can recollect a conversation on that day between yourself and Kastell.

"Costello: Hello, did I wake you up?

Q. This is a call to New Orleans.

"Kastell: No, Frank.

Costello: What's new?

Kastell: Everything is all right. No more on the equipment?

Costello: You will have to get it. This fellow bought for a certain price and we can't give that price.

Kastell: I can use it.

Costello: Yes, but not at that price.

Kastell: I will forget it then?

Costello: You forget it."

Q. Were you telling him—

A. Well, I might have had that conversation.

[fol. 363] Q. You were settling on the price, isn't that right?

A. That particular time, yes.

Q. And there are other conversations here in which you refer to pieces of equipment, and all that has reference to the machines, has it not?

A. Yes, that's right.

Q. Now, your associate Kastell has a criminal record, hasn't he?

A. Yes.

Q. He served time in Atlanta for—

A. Mail something.

Q. Mail fraud.

A. Something.

Q. And he was also convicted of grand larceny in Fonda, New York, arising out of the same transaction?

A. Yes.

Q. And as a matter of fact, you visited him in Atlanta, didn't you?

A. Yes.

Q. Did you have an associate by the name of Sherman, George Sherman?

A. No.

Q. You know him very well?

A. Yes, sir.

Q. Doesn't he accept bets for you at the track?

A. I make a bet with him, Mr. Hogan, yes.

Q. And doesn't he—

A. Accept bets for me, no sir.

Q. Isn't he also authorized to take bets for you?

A. No, sir.

Q. You don't have any—

A. I said that before, Mr. Hogan. I was never a bookmaker.

Q. You referred to yourself as a commission broker?

A. Well, not just now. I have been the years that you have gone back.

Q. Didn't you as recently as August, 1942 characterize yourself as a commission broker in sporting events?

A. In 1942?

Q. August of 1942 in connection with a Federal—

A. Income tax?

[fol. 364] Q. No. In connection with another Federal paper. Didn't you designate yourself as a commission broker in sporting events?

A. Just what do you mean—another paper, Mr. Hogan?

Q. Well, you were asked to give your occupation and over your signature on a Federal document you characterized yourself as a commission broker in sporting events. That was August of 1942. Now, what did you mean by that title?

A. Well, I'd like to know the document first, then I can tell you. I just don't remember it.

Q. Well, would you mean by that that you accepted bets and passed them on to—

A. If I said that, yes.

Q. That would be your meaning?

A. Yes.

Q. That you not only made bets yourself, but that you laid off bets for others, is that it?

A. A commission broker—you would give me a bet and I'd lay it off with somebody and collect and pay and so forth.

Q. So that for example, if I wanted to bet \$10,000 with you, you might shift that to Erickson, and Erickson would give you a commission on that transaction? Is that it?

A. Some bookmaker or another, or probably throw it in the machines if we had mutuels at the time.

Q. What is the commission in that type of bet? Does it vary?

A. Five percent.

Q. And you do quite a bit of that?

A. No.

Q. But doesn't Sherman assist you in that at all?

A. No.

Q. Now, I call your attention to this conversation with George Sherman on June 21, 1943.

"Sherman: Hello, Frank.

[fol. 365] Costello: Hello, George. What's my item?

Sherman: \$3,750.

Costello: Is Jimmy coming over to the barber shop?

Sherman: I don't know.

Costello: I will be there at 11 o'clock."

Q. What does that \$3,750 refer to?

A. He probably owed it to me, or I owed it to him.

Q. A gambling transaction?

A. A gambling transaction.

Q. Would that be one you'd lay off or take yourself?

A. No. What month was that, Mr. Hogan.

Q. June of this year.

A. This year, no. It's my own gambling. My personal gambling.

Q. On a horse race, probably?

A. Yes.

Q. And you refer to it that way?

A. That's the total of the day, either collect or pay.

Q. You'd refer to it that way: "What's my item?"

A. That's right.

Q. And you'd bet with him a number of times during the course of the day?

A. Yes.

Q. Now, you know Frank Erickson very well, don't you?

A. Yes.

Q. I have records of dozens of conversations between you.

A. Yes.

Q. You play golf with him?

A. Yes.

Q. And you bet heavily on each hole, I am told, is that true?

A. Well, just a sporting bet. Maybe \$25 a hole.

Q. No more than that?

A. That's all.

Q. Do you have an interest in his business?

A. No.

[fol. 366] Q. You have no interest in Erickson's business?

A. No interest whatsoever, no.

Q. Do you and he have any business interest together?

A. No business at all.

Q. Not in a restaurant?

A. Restaurant?

Q. Yes.

A. No.

Q. When you were arrested in 1935, did you ask Erickson to provide bail for you?

A. No.

Q. Remember bail was fixed at \$50,000 at that time?

A. Was that 1935?

Q. Yes. Do you recall bail being fixed at \$50,000?

A. I was arrested in 1935?

Q. Yes, on the Scaffa matter.

A. \$50,000?

Q. Yes.

A. No.

Q. When was it that Henry Goldstein, the partner of Max Kallick, the bookmaker, put up the cash and collateral for your bail?

A. Well, that's probably 1939.

Q. 1939, it was \$50,000? 1939, then, is that right?

A. That's right, yes.

Q. Erickson had nothing to do with providing that bail?

A. Goldstein.

Q. Goldstein, the bookmaker?

A. Goldstein went my bail bond.

Q. You have told us about these bookmakers. Tom Shaw—do you know him?

A. Yes.

Q. And have you had dealings with him over the years?

A. No, I haven't; not with Tom Shaw, no.

Q. With Ericson more?

A. No; mostly with Shaw.

Q. Coleman Madden?

A. I gave him some bets.

[fol. 367] Q. Schuyler West?

A. Yes.

Q. Benny Brooks?

A. Yes.

Q. Had you gambled with George Herrick at all?

A. No.

Q. You have seen him often?

A. I wouldn't say often.

Q. He has been at the Madison Hotel?

A. Yes.

Q. How about Bill Warren--do you know him pretty well?

A. Yes.

Q. What form of gambling does he participate in?

A. I know Bill Warren to be retired the last fifteen years.

Q. He doesn't gamble anymore?

A. Not to my knowledge.

Q. Not even a crap game?

A. Not to my knowledge.

Q. There was a time when he gambled?

A. Yes, he used to gamble.

Q. You gambled with him in those days?

A. No, I never gambled with him.

Q. Mike Best--do you know him?

A. I knew him slightly.

Q. You gambled with him?

A. No, I never gambled with him.

Q. How about Jim O'Connell, does he work for you?

A. No.

Q. What does he do for a living?

A. Jim O'Connell, he is a runner at the race track. He takes a bet from Jim to John and John to Jones.

Q. An agent of a bookmaker?

A. An agent. Yes, he works for different bookmakers. He has a certain amount of customers and they give him bets and he gives them to different bookmakers.

Q. He doesn't work for any certain bookmaker?

A. No.

Q. Do you bet extensively with him?

A. Very, very seldom.

[fol. 368] Q. Have any large bets with him?

A. I never had a large bet with him.

Q. What do you mean by a large bet?

A. Well—

Q. A thousand dollars?

A. No, I never had a thousand dollar bet with him.

Q. You do bet heavily on these races, do you not?

A. Well, sometimes a \$500 bet or so.

Q. Frank Ericson testified before Commissioner Herlands in 1939 that, with respect to you, you were a big bettor and bet from five hundred to fifteen hundred dollars a race. Would that be right?

A. Well, in 1939 I might have.

Q. Let me read you this conversation with Jim O'Connell and perhaps you can explain it to us:

"Costello: Hello, Jim.

O'Connell: It is so darn hot, I won't be over.

Costello: That is all right.

O'Connell: I got the money for you.

Costello: How much.

O'Connell: \$2910. I will see you in the morning at the barber shop. If I receive a call from Jerry and have to leave early, I will leave it at the shop for you."

Now, what would that have reference to?

A. Maybe at the end of the day, I probably had to collect that \$2000, whatever you call it.

Q. That is almost \$3000, and you just told us that you did not bet heavily with him.

A. I can win \$3000 with \$20 bets. Eight bets at \$20 a bet would be \$5000.

[fol. 369] Q. That would be a red-letter day.

A. That could happen.

Q. Do you remember June 22, 1942, being a red-letter day?

A. No.

Q. And the Jerry—"if I receive a call from Jerry"—would that be Jerry Catana?

A. No.

Q. What Jerry would that be?

A. I don't know his last name, but he was affiliated with George Sherman.

Q. In the bookmaking business?

A. That is right.

Q. Did O'Connell work for you at any time?

A. No.

Q. Did he work for you in the 20's?

A. Yes.

Q. In the liquor business?

A. In the 20's, yes.

Q. You are still very friendly with him?

A. Yes.

Q. Wasn't he in the Coast Guard at one time?

A. No. His two sons are Coast Guards.

Q. No, I mean in the 20's.

A. No.

Q. Now, did you have an interest in the New York Trotting Meet this last year?

A. Never.

Q. Do you recall that the New York Trotting Meet leased from the New York City Empire Charities, Inc. the Empire City Race Track from July 29, 1943, to September 6, 1943; do you remember that?

A. Do I recall the meet?

Q. Yes.

A. Yes.

Q. Do you recall that Mr. Levy, the president of the old Country Trotting Association was interested in that?

A. That is right.

Q. He is your lawyer, one of your lawyers?

A. Well, yes.

Q. And golf companion?

A. That is right.

Q. You had no interest in that?

A. No interest whatsoever.

[fol. 370] Q. Do you recall that Mr. Levy, in a conversation with you, complained about the man of the Harness Commissioner, Mr. Downing, in insisting upon Pinkerton detectives being in the place. Do you remember some difficulty along those lines?

A. I don't recall. He might have spoken on the subject.

Q. Let me try to refresh your recollection, and this is a conversation on July 29, 1943, Levy to Costello:

"Levy: In Downing's presence, we were told not to have Mahoney or Bolger but had to have Pinkerton. Pinkerton sent us a contract and it's the damndest thing you ever saw. They can refuse to let in anyone that they choose. John is all steamed up. Yesterday, we had a meeting in Mineola and Downing said he could see no reason for convicting a man without a fair trial."

Well, he goes on to talk about this. Do you recall that?

A. Yes, I believe he spoke on that.

Q. And then he continues; this is Levy speaking to you:

"It's like holding a gun up against you. We don't want them. If we cancel them without the landlord's approval—and you see Frank does in Butler's lease.

Costello: If they make any errors, you are subject to suit.

Levy: As boss you should be able to tell them."

Q. Now, what did he mean by referring to you as boss there?

A. Levy said to me "as boss"?

[fol. 371] Q. That is right. "As boss, you should be able to tell them."

A. That is ridiculous.

Q. Well, that is what he said. You didn't tell him it was ridiculous at the time.

A. I don't know if your information is correct.

Q. You don't believe he said it?

A. No, sir.

Q. "The way it stands now," he continues, "you better tell George." Who would George be?

A. Is that me speaking?

Q. No, this is Levy. The entire sentence is, Levy says, "As boss you should be able to tell them. The way it stands now, you better tell George." You say "O. K."

A. I don't remember that conversation.

Q. It doesn't mean anything to you?

A. No, nothing.

Q. You recall Levy expressing concern for the book-makers, saying "we can't jeopardize the bookmakers"?

A. "We can't jeopardize the bookmakers"?

Q. Yes. He was afraid that the Pinkertons would move in and the bookmakers could not operate at the track because the Pinkertons would know the bookmakers and know their agents.

A. He might have spoken on that subject. From a gambling standpoint, if you have a racetrack and have stopped bookmaking, your totalizers would not total as it would if bookmakers were allowed on the racetrack; and everybody that has a racetrack they would prefer to have bookmaking, for the simple reason if I am a thousand dollar bettor and I go to a small track where they don't handle millions and if I am in the mood of betting \$500, my 8 to 5 goes down to 3 to 5, and if I give it to a bookmaker, he takes care, he is going to hold it and keep my price up, but even if the bookmaker doesn't hold it, he throws in \$400 to the machine so the machine would have the \$400 [fol. 372] benefit. So I imagine all these racetrack owners, they just don't like it.

Q. So he was telling you his troubles?

A. He was probably telling me. George Levy is a friend of mine for 24 years or more and we exchange different talks here and there and we play golf. He comes to my home and I go to his home. I never had an interest.

Q. Have you had any other gambling interest recently?

A. Well, last year—no a year before last, I had an interest in Saratoga.

Q. Was that the Piping Rock Casino?

A. That is right.

Q. That was 1942, last year, two summers ago?

A. Two summers ago, the summer before last.

Q. Now, who were your partners in that venture?

A. Well, I don't know who my partners were, there were so many partners there. I just had a very small interest.

Q. You made about \$10,000?

A. Yes, something like that.

Q. And that is a gambling Casino in Saratoga Springs?

A. That is right.

Q. Didn't Joe Adonis have an interest in it?

A. Well, there were so many in it that I don't know.

Q. But he was one of them?

A. Yes, I imagine he had an interest.

Q. And Meyer Lansky?

A. I don't know about Meyer Lansky.

Q. Erickson?

A. No.

Q. No?

A. I am sure that he didn't have any.

Q. You are positive of you and Adonis and you aren't certain of Lansky, is that it?

A. That is right.

[fol. 373] Q. Now, the restaurant or club part was operated by Monty Prosser? A. If I am not mistaken, I think Lansky's brother—it might have been a brother of Lansky.

Q. That would be Lansky's money?

A. That I could not tell you.

Q. Lansky has a lot of experience along these lines has he not? Didn't he run a Casino in Havana for a while?

A. In Havana, yes.

Q. You spent a lot of time in Saratoga in 1942?

A. No, I never spent more than four days there in my life at one time.

Q. So far as you can recall it was yourself, Joe Adonis and one of the Lanskys, either Meyer or his brother—not Erickson?

A. I would not say positive but I know one of them was working in there or had an interest.

Q. Not Erickson?

A. No.

Q. Was there a man by the name of McGoldrick interested?

A. I believe McGoldrick was a floor man. He was working.

Q. And Monty Prosser ran the restaurant?

A. Yes.

Q. And Joe Louis was one of the entertainers?

A. Yes.

Q. The year before that, did you have an interest in the Mother Kelly Club?

A. No.

Q. No interest in that?

A. No.

Q. Adonis did, didn't he?

A. Not to my knowledge.

Q. Do you know a Joe Bedelle?

A. Yes.

Q. Didn't he have an interest in it?

A. No, not to my knowledge. I don't even know Mother Kelly. I have never been in the place.

[fol. 374] Q. Is Bedelle a friend of yours?

A. Well, just an acquaintance.

Q. I show you this police picture and ask you if that is the person known to you as Bedelle?

A. Yes.

Mr. Hogan: Will you mark that please.

(Marked Grand Jury Exhibit No. 3, as of October 20, 1943.)

Q. You have been interested in these gambling Casinos before, have you not?

A. No.

Q. In Florida?

A. No, sir.

Q. Any roulette games any place?

A. No.

Q. How about crap games? Have you ever banked a crap game?

A. No.

Q. Now, going back a few years, you were very close to Arnold Rothstein, weren't you?

A. Yes.

Q. And you gambled with him?

A. No, I never gambled with him.

Q. You never gambled with Arnold Rothstein?

A. No.

Q. You knew him for a long time?

A. Yes, I knew him.

Q. You lent him money?

A. Yes.

Q. And you permitted him to discount your notes?

A. Yes.

Q. And you regarded him as a friend of yours?

A. Well, I thought he was, yes.

Q. In fact, isn't it true, in an affidavit dated July 14, 1942, you said "that Mr. Rothstein and myself were personal friends for upwards of 25 years"?

A. Affidavit?

[fol. 375] Q. Yes, in an affidavit submitted in connection with a lawsuit by the Rothmere Mortgage Corporation against yourself?

A. I never made that affidavit.

Q. You didn't?

A. Not that I recall.

Q. I will show you a copy of the affidavit and see if it doesn't refresh your recollection?

A. Who did I make this to?

Q. It was in the proceeding in the Supreme Court in connection with a motion to dismiss the judgment which had been obtained I believe by default or something.

A. I suppose my lawyer made this thing.

Q. And you signed it?

A. I must have signed this affidavit, yes. I probably signed it without—

Q. You gave him the facts?

A. That is true.

Q. Isn't it true that you were friends, you and Rothstein were friends for a great many years?

A. Yes.

Q. Continuing, "on many occasions Mr. Rothstein would borrow large sums of money from me", that is equally true?

A. That is right.

Q. "On other occasions when I had no available cash to lend Mr. Rothstein, he would ask for and I would give him my note, which Mr. Rothstein would discount at a bank or other lending institution and secure the cash he desired", that is true also?

A. That is true.

Q. So in the 20's—and we recall he was killed in November of 1928—

A. 1928, I believe.

Q. In the 20's you did have quite a bit of money, isn't that so?

A. Well, I don't know I might have. I just don't know.

Q. Well in this affidavit you said you advanced large [fol. 376] sums of money to him. I think there is one advance which is referred to in the suit of \$30,000?

A. Well that was not money. I didn't advance him that money.

Q. You do say in this affidavit that you did lend him large sums of money?

A. I remember lending him money but that particular note that you have reference to, that was not money. That was an accommodation note that I gave him.

Q. You state in this affidavit: "On many occasions Mr. Rothstein would borrow large sums of money from me", and you have told me that is true?

A. Yes.

Q. Now, where did you get these large sums of money from?

A. Where did I get it?

Q. Yes.

A. I might have got it bringing a little whisky in, that is during prohibition isn't it?

Q. That is true, you were in the bootlegging business weren't you?

A. Yes.

Q. And you did smuggle whisky into the country?

A. Yes.

Q. You testified to that before the Federal grand jury. I won't have to read it to you because you admit it here.

A. That is right.

Q. And you had an office for a long time at 405 Lexington Avenue, isn't that so?

A. Yes.

Q. As early as 1925?

A. That is right.

Q. And Jim O'Connell was one of your associates at that time, wasn't he?

A. That is right. He wasn't my associate he was working for me at the time.

Q. What was his job?

A. Well, he was working for me driving a truck, or something, carrying whisky.

Q. And were you associated with Bill Dwyer at that time?

A. No.

[fol. 377] Q. You knew him?

A. Yes.

Q. He was in the bootlegging business also?

A. He was, yes.

Q. And Vanny Higgins—do you recall him?

A. No, I never knew him.

Q. You had heard of him?

A. Yes.

Q. But he wasn't associated with you at any time?

A. No.

Q. Did you own some boats at that time?

A. No.

Q. You used boats of others?

A. Well, yes, chartered a boat or something.

Q. And your income was large in those years, was it not?

A. Well, I wouldn't say it was large.

Q. Well now, taking 1927, for example, you reported \$51,000. That is not small, is it?

A. I didn't report no \$51,000 Mr. Hogan.

Q. Well, I have looked up your state report, Mr. Costello and I tell you that is the figure on it.

A. Well, now, I didn't report that at all. They just assessed me and I paid without making a report.

Q. I guess it is true that you did not pay any income tax from 1929 to 1936, isn't that so?

A. No, 1932—1931.

Q. Isn't it true that in 1936 you filed returns for state income tax for the years 1919 to 1936?

A. Yes, state, yes. That is right.

Q. So that from 1919 until 1936, you paid no state income tax?

A. That is right.

Q. Did you pay federal taxes during those years?

A. Yes.

Q. And then, roughly, you approximated your income for each year, isn't that so?

A. Yes.

[fol. 378] Q. For each of the 17 years; and you paid back penalties on the 1919 tax for 17 years. Now I tell you that your rough approximation of your tax in 1927 was \$51,000 and that, to the best of your recollection in 1936 was what you made in 1927, isn't that so?

A. We don't take in one year.

Q. But I am telling you that is the tax you reported for that year?

A. That is right.

Q. 1927, you reported it as \$51,000; and in 1929 you listed it at \$48,000, is that right; and in 1930, \$35,000. Those are figures that are approximately correct, isn't that so?

A. Well I don't know. I just don't remember just what I did with the state, with them figures. If you have the record there and you have got it from the state department, I will say, yes.

Q. Well, weren't your accountants, Block and Anshus, at that time?

A. Yes.

Q. I also have it from the accountants.

A. Then it must be correct.

Q. I show you a copy of their letter. This was written by Anshus to Mr. Levy, who represented you at that time. Do you recall?

A. Yes.

Q. Now this letter dated March 5, 1937, written to Mr. Levy, says: Anshus has prepared the New York State income tax returns for Frank Costello, for the years 1919 to 1932 inclusive, and the following is a summary of the income—and you will note that the income reported for those years, the 13 years, totals \$305,000; isn't that right?

A. Yes.

Q. Now would you say that that money was made in the bootlegging business?

A. No, I wouldn't say exactly.

[fol. 379] Q. Would you say most of it was?

A. Maybe most of it yes.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 4, as of October 20, 1943)

Q. Did you have any other occupation in those years?

A. Well, I was doing a little real estate at that time.

Q. Did you ever make any money in real estate?

A. Well, made some monies, yes.

Q. Not very much was it? Do you recall any particular real estate transaction in which you made any money?

A. Well, I had bought a building on West End Avenue and 92nd Street.

Q. Yes?

A. And I believe I made a little money there.

Q. How much would you say?

A. Well, I would say maybe twenty-five thousand.

Q. On the sale of that building?

A. Yes.

Q. Did you take it in your name or in the name of a corporation?

A. Well, I think it was a corporation at the time.

Q. Do you remember the name of it?

A. I think it was Koslow.

Q. You contend on the sale of that property you profited to the extent of \$25,000?

A. I think so, about twenty or twenty-five thousand dollars. I just don't remember so far back.

Q. How much did you pay for the property?

A. I think we paid about one hundred twenty-five thousand, I believe.

[fol. 380] Q. Who was associated with you in the purchase of it?

A. I can't think of his name right now.

Q. How much of the \$125,000 was yours?

A. I had fifty percent of it.

Q. So that would be \$62,500.

A. Yes. I think we put up about thirty and then we sold it before we even closed.

Q. Whatever you put up was proceeds of the liquor business, isn't that right?

A. It might have been gambling or liquor.

Q. Gambling and liquor?

A. I can't distinguish money from the liquor.

Q. Now, as early as 1925, you were indicted for bribery

and violation of the National Prohibition Act, isn't that right?

A. 1925?

Q. Yes, 1925.

A. I thought it was 1927.

Q. No, in 1927 the trial was.

A. Oh, I see, yes. That is right.

Q. And there was a disagreement in connection with that, was there not?

A. That is right.

Q. And you owned stock at that time. Do you recall pledging 4,000 shares of Automotive Standards to Arnold Rothstein on a loan transaction?

A. No.

Q. You don't remember that?

A. No sir.

Q. Do you remember testifying in the matter of the Estate of Arnold Rothstein before Surrogate Foley?

A. No sir.

Q. You don't remember testifying there?

A. No sir.

Q. I show you this deposition of Frank Costello and ask you if that isn't—

A. Did you say before Surrogate Foley?

[fol. 381] Q. Surrogate's Court. It wasn't before the Surrogate, but it was pursuant to his order. Do you remember giving this testimony?

A. Nathan Burkan?

Q. Do you remember that?

A. Well, I just don't remember, but if you say that is the record, whatever I said here must be so.

Q. Now, I call your attention to a question and answer on page 9. Mr. Burkan asked: "Did you turn over any security to him?" and your answer is, "Four thousand shares of Automotive Standards, Inc. stock".

A. No.

Q. You didn't give that answer?

A. No, I never heard of that stock, and I never had any stock in my life.

Q. Continuing the questioning, it reads: "Did you get a receipt from Mr. Rothstein upon the delivery by you to

him of this stock?" And your answer is "No". All through this testimony there is reference to this stock. You say that the testimony is incorrect?

A. I think it is, Mr. Hogan. I never had that stock, and I never heard of the name before.

Q. Did you turn over any collateral?

A. No collateral at all.

Q. Did you turn over any jewelry?

A. No. Do you want me to explain it?

Q. Well, you did explain it here.

A. That is all I know.

Q. You never had any stock.

A. No sir.

Q. And you never turned over any jewelry?

A. No.

Q. Can you think of any occupation other than gambling and bootlegging that you had from 1918 to 1932, with the exception of this Kaslow Realty Company?

A. No.

Q. Were you ever employed by anybody from 1918? Yes?

A. No.

[fol. 382] Q. You were convicted in 1915 on a gun charge?

A. That is right.

Q. And sentence was one year in the Penitentiary?

A. A misdemeanor, yes.

Q. Did you get any job after that?

A. No.

Q. You haven't worked since 1916, have you?

A. That is right. Pardon me.

Q. Yes.

A. In 1917 I went into business with a friend of mine, a fellow by the name of Horowitz. I was in business from 1916 to 1919.

Q. What business?

A. He was making dolls. He had a doll factory.

Q. Did he call it the Dainties Products Company?

A. I just don't remember what he called it.

Q. Harry Horowitz?

A. Harry Horowitz.

Q. You didn't do any work there?

A. I had an interest, yes.

Q. Don't you remember being sued by the Columbia Trust Company, and they obtained a judgment for \$3,000 on a loan transaction?

A. On a loan transaction?

Q. Yes. Do you remember that cause of action?

A. That was the ice cream business.

Q. The Dainties Products Company?

A. That was making Eskimo Pies.

Q. You said in your affidavit, Mr. Costello: "Although listed as President of Dainties Products Company, you had no interest in the firm, that you simply did it as a favor to accommodate Harry Horowitz." Do you remember saying that in an affidavit in which you sought to dismiss a judgment that had been taken against you.

A. Well, that is going back twenty-five years.

[fol. 383] Q. This was in 1923, when the judgment was taken against you.

A. That is twenty-one years.

Q. And your office at that time was 405 Lexington Avenue. Now you were in the liquor business at 405 Lexington Ave.

A. I was in the real estate and liquor business at the time.

Q. You didn't do anything by way of producing eskimo pies, did you?

A. Yes, that was prior to that, much prior.

Q. You were actually engaged in producing eskimo pies?

A. Yes.

Q. What money did you put in that?

A. I must have put in there \$20,000.—and I lost it.

Q. Where did you get that?

A. Well, maybe bootlegging or gambling or something. I don't know where I got \$20,000, twenty-five years ago.

Q. But you didn't do any physical work there?

A. No.

Q. Now, you were telling us about another company that you had an interest in that made dolls of some kind?

A. Yes, that is with Horowitz.

Q. That is the same Horowitz that was in the Dainties Company?

A. Yes.

Q. What was the name of that company?

A. I don't remember the name.

Q. How much money did you put in there?

A. I put some money in there—and I lost it.

Q. And that money was obtained from bootlegging?

A. From gambling or bootlegging.

Q. Gambling or bootlegging?

A. Yes.

Q. You were born in Italy, were you not?

A. Yes.

Q. In 1893?

A. Well, either 1893 or 1896. There was a little discrepancy there with my folks.

[fol. 384] Q. When did you come to this country?

A. I was two and a half years old.

Q. Are you a citizen?

A. Yes.

Q. Naturalized?

A. Yes.

Q. When?

A. I imagine around 1920.

Q. 1920?

A. Yes, twenty or twenty-five years ago.

Q. In the Federal Court?

A. Yes.

Q. Have you voted since 1916?

A. No.

Q. You never voted?

A. No.

Q. Did you vote before 1916?

A. No.

Q. You have never voted in your life?

A. No.

Q. I think I asked you before, have you made contributions to political parties at all?

A. No.

Q. You have attended party conventions, haven't you?

A. Just what do you mean by convention?

Q. Either a national or a state convention held for the purpose of nominating candidates for office?

A. No I have been to one convention.

Q. Was that in 1932 in Chicago?

A. That is right.

Q. And you occupied a suite of rooms?

A. I didn't go there for that purpose. I was in Chicago at the time.

Q. And you stayed at the Drake Hotel?

A. Yes.

Q. And you shared a suite of rooms with Jimmy Hines and Jack Plunkett?

A. No, I had my own rooms.

Q. You saw them there?

A. I saw them there.

Q. Whom did you have rooms with?

A. I had my own rooms.

Q. Did you go to school in New York?

A. Yes.

Q. What school?

A. Public School 83.

[fol. 385] Q. How long?

A. Just a short period, a couple of years.

Q. Do you recall as early as 1908 you were arrested? Do you remember that, the first arrest that you had?

A. Yes, we were kids, yes.

Q. Were you in school at that time or had you completed your schooling?

A. No, I believe—I just don't remember.

Q. If you were born in 1893 you would be fifteen then?

A. I must have been in school.

Q. Were you still in school?

A. I might have. I couldn't swear to it.

Q. Now, when you were convicted in 1915 you gave the name Frank Savaro?

A. Yes.

Q. That is not your right name?

A. It is my mother's maiden name.

Q. What is your correct name?

A. Costello.

Q. Was that your father's name?

A. Yes.

Q. Spelled "C-O-S" or "C-A-S"?

A. C-O-S.

Q. You did use the name Castello at one time?

A. No.

Q. Do you remember in 1915 stating that your name was Stella?

A. No.

Q. Never?

A. Never.

Q. Have you used any name other than Frank Savaro or Frank Costello?

A. No.

Q. Never?

A. Just then two names.

Q. Didn't you use the name Murray Hoffman?

A. No.

Q. Didn't you live at the Hotel Cartaret from 1930 to 1931?

A. I never lived there in my life, Mr. Hogan.

Q. At 208 West 23rd Street?

A. I never lived there in my life.

Q. Did you live at 241 Central Park West?

A. Yes.

Q. From 1932 to 1937?

A. That is right.

[fol. 386] Q. And didn't you use the name of Murray Hoffman?

A. No. A friend of mine by the name of Hoffman couldn't get an apartment at the time. He had a lease and then he didn't want to move in and I moved in instead, and lived there seven years.

Q. Under that name?

A. Yes—the lease was under that name but we paid under Costello.

Q. Hoffman didn't live there?

A. No, I took over the lease.

Q. And you went by the name of Hoffman, didn't you?

A. The first check I gave for my rent, it was Costello, it wasn't Hoffman.

Q. The lease always read Hoffman?

A. Well, it was drawn on Hoffman and I moved in and then I notified them that I was taking the apartment from Hoffman.

Q. You didn't use that name?

A. No, absolutely not.

Q. What does Mr. Hoffman do?

A. I don't know. He was a broker, some Wall Street broker.

Q. In applying for the lease you said you were engaged in the manufacture of medicine?

A. I never applied for the lease.

Q. Was Mr. Hoffman in the True-lax Corporation in New Jersey?

A. I believe he was. I remember the name now.

Q. That was no business of yours?

A. No, no.

Q. Do you have an interest in any night club?

A. No.

Q. Own any interest in the Copacabana?

A. No, sir.

Q. Did you have any interest in the Lido Venice?

A. No.

Q. Saratoga, I think it is. Did you ever put up any [fol. 387] money in a theatrical venture?

A. Yes, I put up some money, which I lost, on Hi-li game at the Hippodrome.

Q. How long ago was that—six or seven years ago?

A. All the way back.

Q. Do you have any interest in any bar or restaurant?

A. No.

Q. Do you have an office?

A. No, sir.

Q. Do you have any bank accounts?

A. No, sir.

Q. Brokerage accounts?

A. No.

Q. Safe deposit boxes?

A. No.

Q. Do you keep your money at home?

A. Well, yes.

Q. In cash?

A. Yes.

Q. Do you have any gambling interests other than the ones we have touched on?

A. No.

Q. And you have no ownership interest in anything other than we have touched on?

A. No, sir.

Q. I am going to show you some pictures. Now, you know Willie Moretti, also known as William Moore?

A. Yes.

Q. You have known him many years?

A. Yes.

Q. He lives over in New Jersey, Hasbrouck Heights?

A. That is right.

Q. Is that a picture of him?

A. Yes.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 5, as of October 20, 1943.)

Q. He has a criminal record, has he not?

A. Yes.

[fol. 388] Q. Do you know that he is in charge of the numbers game in New Jersey?

A. I don't know what he is in charge of.

Q. You know he was convicted of the numbers racket in 1934?

A. All I know is that he has been in Elmira.

Q. I beg your pardon?

A. In Elmira and that is in 1914.

Q. How long have you known him?

A. I know him just about that time.

Q. Do you know that in 1934 he was convicted of conspiracy of the numbers racket?

A. No.

Q. You never heard of that?

A. No.

Q. You have heard it rumored that he is in charge of the numbers of the policy game in New Jersey, haven't you?

A. No, I haven't heard it.

Q. You haven't heard that?

A. No.

Q. You are very close to this man?

A. Yes.

Q. He had a breakdown early this year, didn't he?

A. That is right.

Q. He telephoned you frequently before he went to California?

A. Yes.

Q. Would it surprise you to know that the record shows that he called you 130 times in the five months preceding February, 1943?

A. He called me very often.

Q. And he called you at Hot Springs?

A. That is right.

Q. And you telephoned to him at Hasbrouck Heights many times?

A. Yes.

Q. And at Deal?

A. Yes.

Q. Now, what happened to him this year?

A. Nothing.

Q. What type of sickness?

A. I don't know. He got a sort of breakdown.

[fol. 389] Q. Didn't he have a fall of some kind?

A. What do you mean by a fall?

Q. Didn't he fall on his head?

A. I don't believe so. Not to my knowledge.

Q. He got to talking a great deal—rambling?

A. He had a breakdown.

Q. And isn't it true that he started talking too much?

A. I wouldn't say that.

Q. Isn't it true that he became very talkative.

A. Not to my knowledge.

Q. Isn't that the reason that prompted his going to California—to rest?

A. The doctor prescribed him to go for a rest. The man had a nervous breakdown.

Q. Weren't you instrumental in sending him to California?

A. No.

Q. You had nothing to do with that?

A. Absolutely not.

Q. You telephoned frequently while he was out there?

A. I don't believe I telephoned him more than once.

Q. I have records of at least a dozen telephone conversations, but I won't say that you put it all through.

A. He called me.

Q. And you asked Dr. Sarubbi to call him and find out how he was getting along, and also determine if it was safe for him to come back?

A. Yes.

Q. And didn't you caution him to keep quiet—Willie Moore?

A. I don't know what you mean by "keep quiet".

Q. Here is a conversation between you and Willie Moore on June 1, 1943, California. He was at a place called Newhall, wasn't he?

A. I think that was the number, the telephone Newhall something.

[fol. 390] Q. You asked him about his wife and children and then:

"Willie Moore: All are fine. I am all tanned up. I love it here. Solly—"

That is his brother Solly Moore?

A. Yes.

Q. He has a criminal record?

A. Not that I know of.

Q. Do you know that he was convicted of policy also?

A. No.

Q. And also contempt of court for which he got six months?

A. I don't remember that.

Q. He was fined \$1,000 in 1934 for aiding and abetting lotteries?

A. I don't remember.

Q. He said:

"Willie Moore: I love it here. Solly will be down in August and I will be back then.

"Costello: Don't tell me, I know why.

"Willie Moore: Did my brother come up there yet this morning?

"Costello: Not yet, but I expect him any minute.

"Willie Moore: I wrote a letter, but I didn't say much.

"Costello: That is right.

"Willie Moore: I wanted him to come down and spend a couple of weeks with me.

"Costello: Did you take any weight off?

"Willie Moore: Not much.

"Costello: I will let you talk to someone, but don't talk too much, you know."

Q. Now, weren't you cautioning him there not to talk too much?

A. I probably was. The man is a sick man.

[fol. 391] Q. And he would be talking in a rambling fashion, wouldn't he?

A. No, I wouldn't say that.

Q. Hadn't been talking indiscreetly?

A. He was told to keep quiet and take a rest.

Q. Hadn't been talking a little indiscreetly?

A. Not to my knowledge.

Q. He refers to you as "Chief"?

A. No.

Q. Here is a conversation dated June 3, 1943:

"Moore: Hello, chief. I got the telephone connected in 31J.

"Costello: How do you feel?

It goes on further. So on that occasion he called you chief.

A. Not that I recall.

Q. You never heard him refer to you as chief?

A. No.

Q. He is a friend of Sarubbi also, isn't he?

A. Yes.

Q. I think you testified that you asked the Doctor to call up. And see if this does not refresh your recollection, a conversation between you and Sarubbi on June 8, 1943. We won't read the whole conversation but you say to Sarubbi:

"Costello: You are a doctor. Tell me, what you think of this? In the first place he has stopped talking big and he realizes that he has been talking big and is worrying. He can't get it into his head just what made him talk."

Do you recall that? Do you recall saying that to Dr. Sarubbi?

A. Yes.

[fol. 392] Q. And then you ask Dr. Sarubbi to telephone.

A. Because when he was in the hospital I visited him there once or twice and Sarubbi visited him and he talked about having won \$12,000,000 on one bet.

Q. That was a little big. Is he a gambler?

A. He said on the horses—"I made a bit on a horse and I won \$12,000,000"—something like that. He got a nervous breakdown.

Q. Is that what you had reference to when you say he was talking?

A. Talking?

Q. And you didn't want him to come back for that reason?

A. Not for the reason that he was talking too much, but he wasn't cured.

Q. Weren't you afraid also that he might "talk out of school" as the term goes, and say also what is going on in New Jersey?

A. No, I am not afraid of that, Mr. Hogan.

Q. Didn't you tell persons that you planned to keep Willie out there for some time?

A. Yes, yes probably did because he was a hard man to keep that far away, and he has three children and his wife begged me to try to talk it into him.

Q. That would explain your reference in a telephone conversation on June 8th with a certain Tommy.

"Tommy: How much longer will he be out there?

"Costello: Oh, I will keep him out there at least a month or more.

A. Well, probably.

[fol. 393] Q. That means you were doing that because his wife asked you to?

A. That is right.

Q. It was not that he regarded you as his chief and he was taking orders from you?

A. No, that is ridiculous.

Q. Now, in some of the conversations there are references to Ben. Would that be Ben Seigel?

A. I don't know.

Q. A conversation between you and Moore on June 15th, you say

"Costello: Do you see Ben often?

And he replies:

"Moore: A couple of times. Do you want me to tell him anything?

"Costello: No, I will call him."

Wouldn't that be Ben Seigel?

A. I don't know, it could have been Ben Seigel.

Q. Do you know Ben Seigel?

A. Yes, I know him.

Q. Is he referred to some time as Bugs Seigel?

A. That is right.

Q. You know something of his reputation, do you not?

A. Well, I don't know.

Q. You have heard him referred to as the Bugs of the Bugs-Meyer mob?

A. Yes. There were some of the reports here in the newspapers.

Q. Well, he has been in trouble with the law from time [fol. 394] to time.

A. He has been in trouble. As far as I know, he has been in-trouble in California.

Q. And the Meyer of that mob would be Meyer Lansky, isn't that right?

A. That's right.

Q. And you know him very well, of course?

A. Yes.

Q. Now, didn't there come a time when Willie wanted to come back and you told him that he couldn't?

A. Well, I probably told him not to come back, to stay away until he was well-cured.

Q. And didn't you tell his brother also that he wouldn't let him come back?

A. Not that I wouldn't let him come back. I probably told his brother that I would talk to him and try to make him stay there.

Q. Didn't his brother want him to stay there?

A. Yes, everybody was trying to keep him there. He wasn't well. He should stay there and take a rest.

Q. And here is a conversation of June 24th, between you and Solly Moore. Solly says, "I spoke to Willie and he is very worried about his wife. He took her to a country doctor about the headaches and now she feels worse. He wants to come back and take her to a doctor uptown. Costello: No, he can't come back now. Those friends will be on their way out to visit him." Do you recall saying that?

A. No.

Q. You wouldn't deny it. Would you?

A. No, I wouldn't deny, but I just can't recall it.

Q. But it is possible that you told Solly that his brother Willie couldn't come back, isn't that right?

A. That is right, in that he couldn't come back.

Q. Well, that is what I read to you and that is what you finished testifying, that you didn't want him to come back.

A. That it would be better for him to stay away. The [fol. 395] way you express it, Mr. Hogan, it is like I forced him to stay away.

Q. That is the way your conversation reads, as if you are saying, "He can't come back." Your very words are, "He can't come back now." Then you recall—this is on June 24, 1943—and the following day, June 25, 1943, Solly telephoned you to say that he spoke to Willie and Willie was going to stay out there. Do you remember that? Do you remember Solly reporting to you that way?

A. He might have, yes.

Q. This is Solly Moore, isn't it (showing photograph to witness)?

A. Yes.

Mr. Hogan: Will you mark that, please.

(Marked Grand Jury Exhibit No. 6 as of October 20, 1943.)

Q. Now, there is a Willie Sarrentino that is attached to the Moores and you saw him often?

A. No.

Q. You know him very well?

A. I know him but I didn't see him often.

Q. You have talked to him on the telephone?

A. I don't know. I probably spoke to him. Willie Sarrentino is the one that went out there.

Q. He reported to you about Willie Moore?

A. That is right. I think he did.

Q. Is that his picture?

A. No.

Q. That is not William Sarrentino?

A. No.

Q. Is the William Sarrentino who is associated with the Moores—does he have a criminal record?

A. No, sir, not to my knowledge. He owns horses.

Q. You never heard that he had a criminal record?

A. No.

[fol. 396] Q. And do you know that person?

A. No.

Mr. Hogan: Will you mark that, please.

(Marked Grand Jury Exhibit No. 7 as of October 20, 1943.)

Q. Who would Solly Moore mean by the "long fellow"? Can you help us out on that?

A. No.

Q. A conversation, dated July 6, 1943, Solly says:

"I spoke to Willie and he is making reservations for the 1st—those friends arrived to visit him. I spoke to them, and they said he was fine.

Costello: I'm going to put through a call to him myself in a few minutes"—

I made a mistake there. You can cross that out. The conversation is:

"Costello: I spoke to Willie and he has made reservations for the 1st and those friends arrived to visit him and I spoke to them and they said he was fine.

Solly Moore: I am going to put through a call to him myself in a few minutes. Say, I saw my friend, I don't mean the long fellow."

Do you know who that is?

A. No.

Q. Would that be Zwillman—the long fellow?

A. I don't believe so.

Q. You evidently understood him at the time because you say:

[fol. 397] "Costello: Yes, you wanted to see what the reaction was.

Solly Moore: Yes, he thinks our way.

Costello: Naturally. Did you take care of Charlie Casey?

Solly Moore: I am going to call him. I will call you tomorrow morning."

Does that refresh your recollection at all?

A. No. I don't believe I know Casey.

Q. What business would you and Solly Moore have?

A. No business at all.

Q. What would prompt Solly to say, "He thinks our way"?

A. No business at all. Solly Moore has race horses.

Q. Do you have any interest in them?

A. No, I have no interest in them.

Q. Did you have any business dealings with Sarrentino before?

A. No.

Q. Well, listen to this conversation of August 18th:

"Sarrentino: I spoke to that party and agreed to everything you said. After all, we have known each other for so many years.

"Costello: He is a nice fellow.

"Sarrentino: He is 100%. I told him that you had told me of everything that you had told him, not the other part just between you and me.

"Costello: I understand.

"Sarrentino: Jimmy went away?

"Costello: No, he is back."

[fol. 398] And then he says something about coming down the weekend. Do you remember what that was about?

A. No.

Q. Did you and Sarrentino have any transactions that you recall?

A. No, I never had any transactions.

Q. The Moores are close to Abe Zwillman, aren't they? Don't they know him pretty well?

A. I believe they do, yes.

Q. And you, of course, know Zwillman very well, don't you?

A. Yes.

Q. And you know him by his nickname Longey?

A. Yes, Abe.

Q. Abe Zwillman or Longey?

A. Yes.

Q. Do you know his associate, Jerry Catana also?

A. Yes.

Q. Is this Zwillman?

A. Yes.

Mr. Hogan: Will you mark that, please.

(Marked Grand Jury Exhibit No. 8 as of October 20, 1943.)

Q. Is that Jerry Catana?

A. Yes.

Mr. Hogan: Will you mark that, please.

(Marked Grand Jury Exhibit No. 9 as of October 20, 1943.)

Q. And Zwillman and Catana have criminal records, have they not?

A. Well, you showed me a picture—they must have.

[fol. 399] Q. Well, don't you know that Jerry was in New York State Reformatory for robbery?

A. I heard about Jerry, but I never heard of Zwillman.

Q. Let's finish Catana first. You did hear about that?

A. Yes.

Q. And you also heard that he was fined \$1000 and spent eight months in the county jail for bribing a federal juror?

A. No.

Q. Yet you play golf with him?

A. Yes. I played with him two or three times.

Q. And you saw him quite often?

A. No.

Q. Telephoned occasionally?

A. Very, very seldom.

Q. But he never told you about the little federal business?

A. No.

Q. Well, you have seen Zwillman in Hot Springs, haven't you?

A. I saw him there with his wife some years back.

Q. And you saw him at the Madison Hotel occasionally?

A. I probably saw him there once or twice.

Q. He comes to see you there, does he?

A. No.

Q. Did you see him at the race track?

A. No, I never saw him at the race track.

Q. Didn't you telephone him?

A. No.

Q. You never telephoned Zwillman?

A. I don't believe I did.

Q. Does he telephone you?

A. Well, he might have called me.

Q. How many years do you know him?

A. Because I don't believe I ever had his number. I know him about eight, ten years.

[fol. 400] Q. Didn't he ever tell you in that time that he spent six months in the Essex County Penitentiary for assault and battery?

A. No.

Q. Didn't he ever tell you that he spent another six months in the Federal House of Detention for contempt of court?

A. No.

Q. You never heard of those?

A. That he spent six months?

Q. Yes.

A. No, I never heard of it.

Q. Either one?

A. No.

Q. In the same way you heard of Siegel's and Lansky's, you have heard of Zwillman's reputation?

A. Yes.

Q. And he is supposed to control things in Jersey?

A. I know he is in the tobacco business.

Q. That is a front for other things, isn't it?

A. I can't say something that I don't know, Mr. Hogan.

Q. How about Joe Adonis? Do you know him pretty well?

A. Well, I know him, yes.

Q. Is that he (showing a picture)?

A. Yes.

Q. Do you know him by his name Adonis or Dado?

A. Adonis.

Q. His correct name is Joseph Dado?

A. I believe so.

Mr. Hogan: Will you mark that, please.

(Marked Grand Jury Exhibit No. 10 as of October 20, 1943.)

Q. Oh, you have heard him described as of the Brooklyn underworld, haven't you?

A. In the newspapers.

Q. You saw him very often?

A. Well, I did, yes. When you say—often—

[fol. 401] Q. At the Madison Hotel?

A. Yes.

Q. Waldorf?

A. At the bar.

Q. Play golf with him occasionally?

A. No, I never played golf with him.

Q. Aren't there times when he has to see you?

A. Why does he have to see me? I have no business with him.

Q. He had business with you last year at Saratoga?

A. No.

Q. Is it ever necessary for you to see him?

A. No.

Q. Let me read you this conversation, July 23, 1943, Frank Costello to Joe Adonis:

"Joe: Hello.

Costello: Hello, Joe. How are you?

Adonis: O. K.

Costello: What are you doing today?

Adonis: Nothing.

Costello: Want to play some golf?

Adonis: No, I can't play. Where are you going?

Costello: Honinow—I guess it is.

Adonis: What time?

"Costello: We can kick it around and I can talk to you.

Adonis: I forgot. I have appointments at the office.

Costello: I've got to see you.

Adonis: How about 4:30 or 5?

Costello: That is O. K. Over there?

Adonis: Yes.

Costello: O. K., Joe."

[fol. 402] Now, what did you have to see him for on July 23, 1943?

A. Well, I don't know. It might have been I used to meet him at the track very often. We might have talked something about a horse.

Q. Would you have to see him about a horse?

A. Well, maybe.

Q. Is that the best of your recollection?

A. That is the best of my recollection.

Q. And is that why he comes over to the Madison Hotel to see you?

A. He doesn't go there to see me. That is a public place and I am not the only one there. There are thousands of others there.

Q. Is that a hang-out of his?

A. I wouldn't say that is a hang-out.

Q. How long have you known him?

A. About 8, 10 years.

Q. And another person from Brooklyn, Little Augie Pisano—do you know him?

A. Yes.

Q. Is that a picture of him?

A. That is right.

Mr. Hogan: Will you mark that please.

(Marked Grand Jury Exhibit 11, as of October 20, 1943.)

And you know his reputation, do you not?

A. Through newspapers.

Q. And he is related to Kelly, Jimmy Di Salvio?

A. Yes, a son-in-law.

Q. And you saw him at the Madison Hotel?

A. A few times.

[fol. 403] Q. Now, a detective submits a report of May 19, 1943 and says that he observed Frank Costello with Little Augie in earnest conversation for one hour in the cocktail lounge of the Madison Hotel, from 5:30 to 6:30, and they left the hotel together and took a cab. Do you have any recollection of that?

A. We might have went for dinner.

Q. It is entirely possible?

A. Yes.

Q. You know him that well?

A. Yes.

Q. How long have you known him?

A. 10, 12 years.

Q. Well, perhaps you can recall this particular occasion when I tell you that Little Augie had just come from Dr. Sarubbi's where wax had been taken out of his ears?

A. No.

Q. Do you remember him complaining about that?

A. No.

Q. Saying that he was to the doctor down on Oliver Street to have wax taken out of his ears?

A. No.

Q. He knows Sarubbi?

A. Yes.

Q. He and Sarubbi and Socks Lanza are very friendly?

A. Sarubbi has been Lanza's physician.

Q. And Sarubbi is a good friend of yours?

A. I thought I told you that last Wednesday.

Q. And Lanza is a good friend also?

A. Well, he is a friend.

Q. You have known him over a number of years?

A. I have known him for 7 or 8 years.

Q. Sarubbi is very friendly with Johnny Torio?

A. I don't remember that.

Q. Do you remember they were stockholders in Pendergast-Davies?

A. I don't know.

Q. You know Al Capone?

A. Yes.

[fol. 404] Q. How about Frank Nitti?

A. I know him too.

Q. Willie Bioff?

A. No.

Q. Never met him?

A. I never met him in my life.

Q. Now, Nitti and Capone were from Chicago?

A. Yes.

Q. They were associated in Chicago, right?

A. They are from Chicago, yes.

Q. How about Louis Compagna?

A. I don't know Louis.

Q. Paul de Lucca; also known as Paul Ricca?

A. I know him very slightly.

Q. Met those people in Chicago?

A. Yes.

Q. How about Phil Fiandaro?

A. I don't know him.

Q. Do you know Francis Meritodo?

A. No.

Q. A brother-in-law of Capone's?

A. No.

Q. How about Charlie Joey—I don't know if that is G-i-o-e?

A. No, I don't know him.

Q. Johnnie Roselle; you know him?

A. Yes, I know him.

Q. You telephone him on occasion, do you not?

A. Did I telephone?

Q. Yes, there is a record of one call to Johnnie Roselle in Chicago?

A. In Chicago?

Q. From New York to Chicago.

A. No, I have no recollection.

Q. But you do know him?

A. Yes.

Q. He is on trial in the federal court?

A. Yes.

Q. And Nitti was known as the "enforcer" isn't that true?

A. That is what the newspapers say, yes.

Q. Now, let's get back to Lanza for a while. You have been friendly with him for a long while?

A. About 8 or 9 years.

Q. Is that his picture?

A. Yes.

[fol. 405] Mr. Hogan: Will you mark it please.

(Marked as Grand Jury Exhibit 12 as of October 20, 1943.)

Q. And he sends you meat from time to time?

A. No.

Q. You know he is in jail?

A. I believe so.

Q. Specifically, in December of last year didn't he send you some deer meat by a person known as Rocco? Do you remember Rocco bringing you deer meat from Lanza?

A. No.

Q. Do you remember receiving a turkey from Lanza?

A. No.

Q. Well, you better find out who is taking your meat because Lanza was of the opinion that he sent it to you.

A. I never ate deer meat in my life. That is why I am positive.

Q. He didn't send you a turkey in December, 1942?

A. No.

Q. Did you have anything to do with putting up his bail?

A. No.

Q. Did you give any money to Mrs. Weinstein of the Fish Forwarding Company?

A. No.

Q. Mr. Sullivan says he was in your apartment when Lanza was there?

A. Can I explain that myself?

Q. Sure:

A. Mr. Lanza was not in my apartment. Mr. Sullivan and Mr. Lanza and Dr. Goldwater came to my apartment.

Q. Sullivan came with Lanza?

A. Yes.

Q. Who is Dr. Goldwater?

A. He is a dentist.

[fol. 406] Q. Let's get the story correct then. Did you telephone Assemblyman Sullivan and ask him to come over there?

A. No, sir.

Q. For what purpose does Lanza, Sullivan and Goldwater come to your apartment?

A. Dr. Goldwater is a dentist. I believe his number is 175 West 72nd Street. He is a neighbor of mine, and I know him, and prior to the election of the Executive of Tammany Hall I used to meet him. He used to walk his dog. He has a Boston Bull, and I have a dog also, and we used to talk, and this particular day he told me that "Well, it looks like we are going to have a new leader in Tammany Hall." He said "I am rooting for Jimmy Fay." This is Dr. Goldwater telling me. I said "I am rooting for Fay, for Jimmy." He said "My friend, Pat Sullivan, is a leader. I am going to talk to him and see if he will vote for Fay." I said "Tell you what you do, Doc, if you get a chance come up to my house and you can have him there and both of us can talk to him." Then, four or five days later the three came to my home.

Q. Was Lanza a friend of Dr. Goldwater or Sullivan?

A. He knew both of them, but don't understand me now, I am not saying that they might have met in the hall, but I had no appointment with Lanza. But the three of them walked in together.

Q. But Lanza had been in your apartment before?

A. Mr. Hogan, the reason I want to make this statement is that the newspapers had the statement that he met—

that when he walked into my home, Mr. Lanza opened the door.

Q. Which is wrong?

A. Which is absolutely wrong.

Q. He came in with Lanza?

A. That is right.

[fol. 407] Q. But Lanza had been to your apartment before?

A. He has, yes.

Q. And he was in your apartment after that?

A. I don't know. He might have. He visited me.

Q. Now, do you recall last week you told us that when Rosenthal came to you after the convention and asked you to appoint one of his election district captains for the position of attendant, you hesitated because you had in mind that Sarubbi might want to appoint somebody to that position. Do you recall that testimony?

A. Yes.

Q. And I think in connection with it you said that Sarubbi, some time before, had told you that his son-in-law was a lawyer and he was trying to get him a job?

A. Yes.

Q. Now, did you meet that son-in-law, a Mr. Viggiano?

A. No, I never met him.

Q. You know he is also a brother-in-law of Lanza's?

A. Well, I don't know. I know that Lanza has a brother-in-law.

Q. A lawyer?

A. A fellow that ran for assemblyman or something.

Q. Yes.

A. Is that the same one?

Q. Yes.

A. I never connected the two as one.

Q. Don't you recall a person known as Rocco Pompillio bringing spaghetti and things to your house and meat from Lanza?

A. No.

Q. But you know Rocco—he is an old friend of yours, isn't he?

A. I would not say he is an old friend of mine. I just can't place him now.

Q. Didn't you call him?

A. Oh, yes.

Q. On May 23, 1943?

A. Yes.

[fol. 408] Q. Do you remember he was in the Jewish Hospital?

A. That is right, the fellow died.

Q. You told him at that time "If your wife needs anything tell her to call me. I will take care of anything."?

A. Yes, if she needs some money for the hospital or anything.

Q. You have known him for a long time?

A. Yes.

Q. You know he has a criminal record?

A. Yes.

Q. A long one?

A. I don't know how long.

Q. It is pretty impressive. He is a friend of Lanza's also, isn't he?

A. I would not know that.

Mr. Hogan: Mark that.

(Marked Grand Jury Exhibit No. 13, as of October 20, 1943.)

Q. Didn't he bring things from Lanza to you?

A. No.

Q. He is dead, you say?

A. Yes, I believe he died.

Q. I show you another picture—who is that?

A. That is Meyer.

Q. Meyer Lazansky. It was taken some time ago. It is Meyer Lazansky and you recognize him?

A. Yes.

Mr. Hogan: Will you mark that.

(Marked Grand Jury Exhibit 14, as of October 20, 1943.)

Q. You have known him a long time?

A. About ten years.

Q. And you talk to him on the telephone, don't you?

A. Yes, sure.

[fol. 409] Q. Well, now, I can't make out this conversation. Perhaps you can explain it to me. July 14, 1943, somebody calling Costello:

"Hello Frank. Do you want to see me?"

Costello: "No, the other fellow is home and wants to see you."

This unknown man says:

"What is his number?"

Costello: "Schuyler 4-0906"

That is Lazansky's number, isn't it?

A. I don't remember that number.

Q. Well, I tell you it is. I looked it up.

Costello: "What is the matter? Jerry is supposed to call me."

Now who would that be? Would that be Catena?

A. I don't know.

Q. The man says:

"He was working on that new thing last night."

Costello: "Tell him to call me tomorrow."

"O. K. Will you be around the hotel?"

Costello: "Yes."

Q. Isn't that Zwillman calling you and you are telling Zwillman that Jerry was supposed to call you but he didn't, [fol. 410] and that while you don't want to see him, the other fellow, Meyer Lansky, wants to see you?

A. I don't recall the conversation.

Q. Is it possible that that would be the explanation of the conversation?

A. Well, I don't know why Zwillman would call Jerry. I can't understand that.

Q. No, I mean that Zwillman was calling and saying, "Do you want to see me?", and you replied, "No, but the other fellow is home", meaning Lansky, "and he wants to

see you." Then you say to Lansky, "Jerry was supposed to call me", and Zwillman said, "He was working on that new thing last night", and you say, "Tell him to call me tomorrow."

A. I don't recall it.

Q. Do you want to read the conversation? Maybe that might help you.

A. Maybe that is so.

Q. It was only a few months ago and maybe you will be able to recall it.

A. I don't know what I had for dessert night before last. (Reading paper) I don't recall the conversation.

Q. Do you know Joey Rao?

A. From up in Harlem?

Q. Yes.

A. Yes.

Q. That is his picture, isn't it?

A. Yes.

Q. You have known him for a long time?

A. I haven't seen him in years.

Q. You know he has a criminal record?

A. Yes.

Q. By the way, you see Lansky at the Madison Hotel and other places, don't you?

A. Well, I have seen him at the Madison, yes.

Q. You met him there?

A. Yes.

[fol. 411] Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #15, as of October 20, 1943.

Q. Now, here is a friend of yours, George Offner. You know him very well, don't you?

A. Yes.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #16, as of October 20, 1943.

Q. You play golf with him?

A. Yes.

Q. And he has quite a record as a forger, hasn't he?

A. I don't know what sort of record he has.

Q. You know he has a criminal record?

A. Yes.

Q. You know that Judge Donnellan of our Court of General Sessions sent him away for four to eight years in 1933 for forgery?

A. I don't believe I knew him in 1933.

Q. But do you know it now?

A. Yes.

Q. And he calls you constantly, doesn't he?

A. Yes.

Q. I have a record of fifty telephone calls from Mr. Offner. Are you in business with him of any kind?

A. No, no business at all.

Q. Do you bet with him also?

A. Well, I did a little betting with him, and we golf.

Q. Did you go out to gambling games with him at all?

A. No.

Q. Listen to this conversation—

A. Other than race tracks.

[fol. 412] Q. Here is a conversation between Offner and you. It says, Offner says:

"Offner: I didn't get home until 4 o'clock.

Costello: What the hell happened? Where were you until then?

Offner: Out there. I went for \$2300.

Costello: Did they stay open until then?

Offner: I had to walk to the golf grounds to get home.

Costello: I would like to talk to you later."

Q. And then you make a meeting for the Waldorf barber shop. That is in June of this year. Does that refresh your recollection?

A. He might have played golf and then he might have played cards.

Q. At the golf house?

A. Maybe.

Q. Poker or bridge?

A. Poker or gin rummy.

Q. \$2300?

A. Yes. They play pretty steep.

Q. Do you play that too?

A. No.

Q. Do you play golf with Nick Rattini also?

A. Yes, I play with him.

Q. That is a picture taken some time ago?

A. Yes..

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #17, as of October 20, 1943.

Q. What name do you know him by, Rattini or Perry?

A. Perry.

[fol. 413] Q. And Perry has a record as a robber.

A. I don't—for the last few years.

Q. Don't you know that he has been in Sing Sing?

A. He never spoke about it but I heard rumors.

Q. And you played golf with him constantly?

A. No. I played quite a few times with him.

Q. And he telephoned you occasionally?

A. He did, yes.

Q. Did you have any business deals with him?

A. No.

Q. What would you mean—I am reading from a telephone conversation of June 19, when you said:

"Costello: Did you see Fred. z. Δ

Rattini: I spoke to him at 12:30. He was going to contact you.

Costello: You haven't seen him since?

Rattini: No.

Costello: He spoke to him in front of my man. If he says he didn't speak, he is lying. Get a hold of him and let me know.

Rattini: Where will you be?

Costello: I am at home now. Then I am going to the barber shop. Tell him it is official, because my man was there.

Rattini: I will call him and find out."

Q. What does that mean?

A. I don't remember any Freds.

Q. You don't remember telling Rattini that your man was there? It doesn't refresh your recollection?

A. No.

[fol. 414] Q. Did he have any interest in that trotting meet?

A. No to my knowledge.

Q. Would you know what he meant in a conversation with you on July 22, 1943. You say:

"Costello: What does it look like?

Rattini: I think it is O. K. unless we are told to stop, and as long as it isn't disastrous.

"Costello: Nothing will happen.

Rattini: We can be working in the meantime and see what happens on the other things."

Q. Does that mean anything to you?

A. No.

Q. Well now, in fairness, this may not be that Rattini, although he represents himself as— You will notice in the opening of the conversation—

"Hello Frank, Do you recognize the voice?

Costello: No.

And the man says:

"Yonkers".

Q. Rattini lives up there doesn't he?

A. Yes.

Q. Would that conversation be Rattini?

A. No, I don't think so.

Q. Do you recall the conversation?

A. No.

Q. It doesn't refresh your recollection as to what was meant by "unless we are told to stop".

A. No.

Q. Do you know Mike Coppola?

A. Yes.

[fol. 415] Q. Known as Trigger Mike. Is that a picture of him on the left—stand up picture?

A. Yes.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #18, as of October 20, 1943.

Q. And he has a long criminal record, has he not?

A. Not that I know of.

Q. I have it in front of me, starting 1914, twenty-four arrests, convicted of petit larceny, grand larceny, a number of discharges, a homicide, felonious assault.

A. All that I know, being a gambler, being around, I don't pry into people's business. I have known everybody that you mentioned, but I don't know their background and I don't inquire.

Q. You see him from time to time, don't you?

A. Yes.

Q. At the race track and other places?

A. And four million other people never knew that I was convicted of a misdemeanor twenty-eight years ago. I never tell people my business. Why should they tell me theirs?

Q. Do you know Louis Buchalter?

A. Yes.

Q. Also known as Lepke?

A. Yes.

Q. Hines was a good friend of yours, wasn't he?

A. He was.

Q. And you followed his trial carefully?

A. Through the newspapers, yes.

Q. Don't you remember in the newspapers that there was testimony to the effect that Trigger Mike Coppolo took over policy after the Dutchman was killed?

A. I don't know about that.

[fol. 416] Q. You don't remember that?

A. I didn't see that was in the testimony. I might have over—

Q. Among other things, haven't you heard that he controls policy in East Harlem?

A. No, I haven't heard that.

Q. You never heard that about him?

A. No.

Q. Now you said you have known Lepke. He was a good friends of yours before, isn't that right?

A. He wasn't a good friend of mine.

Q. You know him for many years.

A. Just by accident, casually, just like I would know a man, and you would meet him.

Q. You never met him other than casually?

A. No.

Q. Never arranged?—

A. Not to my knowledge.

Q. To have a meeting with Lepke?

A. No, not to my knowledge.

Q. How about his partner Gurrah—Jacob Shapiro?

A. I never met him in my life.

Q. Lepke did the meeting for him, did he?

A. Just what do you mean? What do you mean he did the meeting for him?

Q. Did you ever talk to Lepke about Shapiro?

A. I never had any business with Lepke in my life.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #18, as of October 20, 1943.

Q. Do you know Joe Biondo?

A. Yes.

Q. Is that his picture?

A. Yes.

[fol. 417] Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #19, as of October 20, 1943.

Q. This is Kastell?

A. Yes.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #20, as of October 20, 1943.

Q. Now Joe Baker. Is he a friend of yours?

A. Yes.

Q. Is that his picture?

A. Yes.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #21, as of October 20, 1943.

Q. He is a famous pickpocket.

A. I don't know. I wouldn't say that.

Q. Well now, you see him regularly at the Madison, don't you?

A. I never saw him pick anybody's pocket. He lives in the Madison Hotel and I see him. I walk in and have a drink and he is there—"Hello Frank", and "Hello Joe". I am not married to him.

Q. You haven't heard Mr. Costello, that his specialty is picking pockets?

A. No, I wouldn't say that.

Q. Would you be surprised?

A. Nothing surprises me. I know people but I don't know their background—their past performance.

Q. Do you know him by any other name?

A. No.

Q. He is also known as Joseph Harris, Joseph Zucker, [fol. 418] Joseph Hoffman, and you can see his criminal record takes about two pages starting in 1906.

A. I am not interested in that.

Q. I am just telling you that you be careful the next time you see him. You can never tell when that instinct creeps up. You have told us that you know Ben Siegal?

A. Yes.

Mr. Hogan: Mark that please.

Marked Grand Jury Exhibit #22, as of October 20, 1943.

Q. You see him when you go to California?

A. I have been to California once in my life.

Q. Did you see him then?

A. I did not. I don't believe I did. I was there two days, three days.

Q. How about Bill Duffy—do you know him?

A. I know him, yes.

Q. Was he in the bootlegging business?

A. I haven't seen him for years.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 23 as of October 20, 1943.)

Q. Now do you know Charles Luciano?

A. Yes.

Q. You knew him very well?

A. I knew him, he is an acquaintance.

Q. Isn't a friend?

A. Well I don't know what you are calling a friend—just an acquaintance.

[fol. 419] Q. But you were very close to Lucky?

A. I knew him.

Q. You saw him at Hot Springs and other places?

A. The way you meet a million other people.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 24 as of October 20, 1943.)

Q. By the way was Luciano in bootlegging?

A. Not to my knowledge.

Q. Do you know Tom Penuccio, Tommy the Bull?

A. No.

Q. You never knew him?

A. No.

Q. How about Joe Misseri, do you know him?

A. No.

Q. Joe the Boss?

A. No.

Q. No?

A. I don't know him.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 25). (as of October 20, 1943.)

Q. Now you knew Dutch Schultz?

A. Well, slightly.

Q. How about the boys who were associated with him. How about Bo Weinberg, do you know him?

A. No I don't know him.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 26 as of October 20, 1943.)

[fol. 420] Q. Do you know George?

A. No.

Q. You knew Dixie Davis, didn't you?

A. Yes.

Q. George was very close to Dixie. I am surprised you didn't meet him.

A. I never met him.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit 27 as of October 20, 1943.)

Q. Do you know Sam Krantz?

A. No.

Mr. Hogan: Mark that please.

(Marked Grand Jury exhibit No. 28 as of October 20, 1943.)

Q. How about Morty Krompier?

A. I know him slightly.

Q. And Jules Martin. Did you know him when he was alive?

A. No.

Q. You know Irving Sherman don't you?

A. Yes.

Q. Was he friendly with Schultz?

A. Not to my knowledge.

Q. How long have you known him?

A. Well I probably know Sherman, well, say about 6 years.

Q. He is not employed by you, is he?

A. No.

Q. Do you recall asking him to get you two tickets for a plane on one occasion in June?

A. I believe I did, yes.

Q. And asked him to get Congressman Klein to help on that matter?

A. I might have, yes—which I never got.

[fol. 421] Q. And saying this in the conversation: "I can get that myself but I want to be sure I don't get put off half way. If it is allright with you use Cappozzoli's name. It will look official." Do you remember saying that?

A. I might have.

Q. Had you before that time used congressional priorities to go to New Orleans?

A. No, I never did and that was never fulfilled.

Q. But you did have it in mind at the time?

A. Yes.

Q. Now you know Dutch Goldberg?

A. Well very slightly.

Q. You have heard that he has a criminal record?

A. Yes.

Mr. Hogan: Mark that please.

(Marked Grand Jury Exhibit No. 20 as of October 20, 1943.)

Q. Owney Madden, do you know him?

A. Yes.

Q. Well?

A. I see him every time I go to Hot Springs, he is a resident.

Q. How about George Scalise?

A. No, I never met him.

Q. Legs Diamond?

A. No. I knew of him, seen him but never close.

Q. Vincent Coll?

A. Who?

Q. Vincent Coll?

A. No.

Q. Getting back to Brooklyn for a minute, you know Frankie Yale?

A. No.

Q. You never met him?

A. No.

Q. You didn't meet him in Chicago with Capone?

A. No.

[fol. 422] Q. How about Wolensky who was killed recently, did you know him?

A. Yes.

Q. And his partner, Tommy Cutty?

A. Yes, slightly.

Q. You knew Morris Zweig, little Ziggy?

A. Yes.

Q. You knew him?

A. Yes I knew him.

Q. Larry Fay?

A. Well I don't know if I got Larry Fay right or wrong. I would say I knew him, seen him, not friendly.

Q. Tony Bender?

A. Yes, well enough to say hello, how are you.

Q. Patsy Dykes?

A. Yes.

Q. He comes to see you at the Madison?

A. No.

Q. He has not been to the Madison to see you?

A. He doesn't come to see me.

Q. But you did see him there?

A. Yes I see him around.

Q. You have told us that you knew Dixie Davis.

A. That is right.

Q. And you know another disbarred lawyer, Gene McGee. Do you know him?

A. I told you this last Wednesday, I got a yard and a half of him.

Q. \$150?

A. A yard and a half.

Q. Does he give you legal advice occasionally?

A. No. I don't need legal advice from him.

Q. Morris Ernst, do you know him?

A. Yes.

Q. You went to him in 1940 because the police were bothering you, didn't you?

A. Yes.

Q. And what did he do for you at that time?

A. Was it 1940?

Q. So I believe. What legal services did he do for you in 1940?

A. Well I believe he went down to see the police commissioner for me, if I am not mistaken. He also—he seen some—[fol. 423] body in Hogan's office if Mr. Hogan was District Attorney then.

Q. Not 1940, Mr. Dewey—Mr. Dewey—I came in in 1942.

A. No I meant Mr. Dewey, I beg pardon.

Q. Did he see somebody?

A. I imagine he did.

Q. What was the purpose of his calls. Weren't the police bothering you at that time—pick you up?

A. No, I was never picked up in my life, but there were some rumors around.

Q. That they were going to pick you up?

A. That they were going to pick me up and so forth.

Q. And charge you with vagrancy?

A. Yes.

Q. And you went to Morris Ernst and he went to the Commissioner?

A. He was my lawyer.

Q. You were not picked up?

A. No.

Q. How did you hear that you were going to be picked up?

A. Well, there were rumors around and I heard.

Q. Some police friends of yours told you?

A. I don't know if it was a police friend. I learned of it anyway.

Q. You know a person known as Little Augie DelGazzo?

A. No.

Q. Red Levine?

A. No.

Q. How about Stark brothers, do you know them?

A. No.

Q. Did you have any interest in something called phonovision?

A. I did have an interest.

Q. When was that?

A. That was a few years back. I made an investment there and it never materialized.

Q. Was that the name of it?

A. Yes.

Q. Meyer Lansky has an interest in it, too?

A. No, not to my knowledge. He is connected, I believe, with the

[fol. 424] Q. He is connected, I believe, with the Manhattan Simplex Distributing Company. Have you an interest in that company?

A. No.

Q. Do you know that he is interested in distributing Wurlitzer automatic coin phonograph machines?

A. No.

Q. Wasn't phonovision something similar?

A. No.

Q. Will you explain to us what phonovision was?

A. What Lansky is interested in is a music box, a juke box; and in some of my conversation when meeting him, he probably wanted me to sell some in New Orleans. It was strictly a legitimate business.

Q. Does Mills Novelty Company make these machines too?

A. No. It is Wurlitzer. The phonovision—that is a moving picture machine. You put a nickel in there or a dime and they have a record with the picture.

Q. I see.

A. It is a small moving picture.

Q. And you say a few years ago, you invested some money in that?

A. That is right.

Q. How much?

A. I don't know; about ten or fifteen thousand dollars.

Q. Wasn't Irving Sherman connected with that as manager?

A. Yes.

Q. And a Frank Orsetti also?

A. Yes.

Q. He is a booking agent from California?

A. That is right.

Q. Was there a Harry Banks also who was connected with it?

A. Well, he was in the office, yes.

Q. Now, weren't there some arguments among the people interested because Banks borrowed money from Nick Rosen [fol. 425] in Philadelphia?

A. I don't know anything about the arguments. All my interest was that I bought a certain stock, which was never delivered, from Frank Orsetti. I don't know of any other parties or any fellows.

Q. There were other fellows financing it?

A. All I was interested in if the thing—he phoned me to get a certain block of stock.

Q. Do you know Nick Rosen?

A. I have heard of the name. I believe I know him slightly.

Q. In Philadelphia?

A. Slightly, yes.

Q. Did you get your money back?

A. Yes.

Q. Wasn't there a law suit as result of it?

A. Not with me. I had no law suit.

Q. Kastel?

A. No, I just held one man responsible, Frank Orsetti.

Q. Did Kastel sue anybody in connection with this?

A. No.

Mr. Hogan: Thank you.

[fol. 426] [folios 283a through 419a of original record]

Government's Exhibit No. 2

TESTIMONY OF FRANK COSTELLO BEFORE THE HON. CHARLES B. SEARS, OFFICIAL REFEREE, IN THE MATTER OF THOMAS A. AURELIO (ALSO KNOWN AS THOMAS ANTHONY AURELIO), AN ATTORNEY, SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT.

October 25, 1943

FRANK COSTELLO, residing at 115 Central Park West, New York City, called as a witness on behalf of the Petitioner and being duly sworn, testified as follows:

Direct examination:

By Mr. Hogan:

Q. How old are you, Mr. Costello?

A. Oh, fifty.

Q. And where were you born?

A. Italy.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. When did you become a citizen?

A. I believe in 1921 or 1922; I just don't recall.

Q. Have you ever held office or a position in a political party?

A. No, sir.

Q. Have you ever been a member of a political party?

A. No, sir.

Q. You have never registered in any political party?

A. No, sir.

Q. Since you became a citizen in 1921 have you ever voted in any election?

A. No, sir.

[fol. 427] Q. Do you know the respondent, Judge Aurelio?

A. Yes, sir.

Q. And how long do you know him?

A. I believe since the early part of the year, around February.

Q. Of 1943?

A. 1943.

Q. What is your business at the present time, Mr. Costello?

A. I am connected with the Louisiana Mint Co.

Q. Will you describe what type of business that is?

A. It is a mint vending machine.

Q. Vending machine?

A. Yes.

Q. Suppose you describe a vending machine to us.

A. Well, you insert a five cent piece—

Q. Can you insert more than a five cent piece?

A. No, sir.

Q. Aren't there some machines that take larger coins than that?

A. Well, there is, but not of my company.

Q. You have only the five cent machine?

A. That is right.

Q. You were telling us that you insert a five cent piece.

A. And you pull a lever, and you get a mint.

Q. Yes.

A. A package of mints.

Q. Do you always get a mint?

A. Yes.

Q. And what happens after the lever has been pulled?

A. Well, you are liable to get two or four slugs, commonly known as slugs.

Q. You don't always get slugs?

A. No.

Q. Well, isn't there an arrangement of symbols which is displayed on the machine as a result of pulling the lever?

A. Repeat that question, Mr. Hogan.

Q. After you pull the lever, mechanism is set in motion?

A. Yes.

[fol. 428] Q. And then a series of symbols are displayed, isn't that right?

A. On the wheels.

Q. Yes. What are those symbols?

A. Well, there are three plums and so forth, two lemons—

Q. Different fruits?

A. Cherries and so forth.

Q. Yes. And on some combinations of fruits you get only mints, and on others you get slugs?

A. No, you always get mints.

Q. And you get slugs on some combinations?

A. On some combinations.

Q. Isn't this commonly called a slot machine?

A. Commonly known as a slot machine.

Q. We will come back to that later. Do you know Michael Kennedy, the leader of the Democratic Party in this county?

A. Yes, sir.

Q. And how long do you know him?

A. Oh, ten or twelve years.

Q. Do you recall that early in 1942 Christopher Sullivan was removed as leader of the Democratic Party in this county?

A. Yes, sir.

Q. And would you say that you met Mr. Kennedy about 1933 or 1934, would that be about right? You said ten or twelve years ago.

A. Ten or twelve years ago, yes.

Q. And did you see Mr. Kennedy occasionally between 1933 or 1934 and 1942?

A. Yes, sir.

Q. And where would you see him?

A. Well, I would see him in a restaurant, Madison Square Garden, occasionally in a bar having a cocktail.

Q. And you got to know him pretty well?

A. (Continued) Race track; yes.

[fol. 429] Q. What did you call him?

A. Mike.

Q. And what did he call you?

A. Frank.

Q. Do you also recall that in April, I think it was April of 1942, Mr. Kennedy was elected leader of the Democratic Party in this county?

A. Yes, sir.

The Referee: When was that?

Mr. Hogan: April of 1942, your Honor.

The Referee: 1942?

Mr. Hogan: April 14th, 1942.

The Referee: Yes.

Q. Now you have testified that your recollection is that Christopher Sullivan was removed some time in February of 1942. Did you see Mr. Kennedy between February and April of 1942?

A. Yes.

Q. Do you understand that question? The question is, did you see Mr. Kennedy between February of 1942 and April of 1942, when he was elected leader?

A. Yes.

Q. The answer is yes. And where did you see him?

A. I have seen him at the Madison Hotel.

Q. The Madison Hotel. Was it at lunch or dinner?

A. A luncheon.

Q. A lunch. And you had a conversation with him there?

A. Yes.

Q. Tell us what was said by him and what was said by you?

A. He told me that he was going to be one of the candidates for the executive leader of Tammany Hall.

Q. Yes.

A. Would I try and help him.

Q. What did you say?

A. I told him I couldn't very well do that, for the simple reason that I had committed myself to help Jim Fay, Congressman Fay.

Q. Is Congressman James Fay a District leader of the Democratic party also?

A. Yes, sir.

[fol. 430] Q. Do you know the district?

A. Offhand I could not tell you the number of the district.

Q. It is an Assembly District?

A. Yes.

Mr. Sheridan: The 12th Assembly District, my own district.

Mr. Hogan: The 12th Assembly District, middle?

Mr. Sheridan: Lower.

Mr. Hogan: Lower, I see.

Q. And when you told him that what did Mr. Kennedy say to you?

A. Well, he said, "I am trying to solicit all the help I can, but if you can see where you can help me I will appreciate it."

Q. Did Mr. Kennedy have your telephone number at that time?

A. No.

Q. Did you give it to him on that occasion?

A. I believe I did.

Q. Did he ask you for it?

A. Well, I just don't recollect whether he asked me or I gave it to him voluntarily.

Q. Is that number listed in the telephone book?

A. No, sir.

Q. Did he telephone you after the meeting at the Madison Hotel?

A. Yes.

Q. How many times, if you can recall, did he telephone you after that meeting and before he was elected leader?

A. Oh, I couldn't—Maybe half a dozen times.

Q. And what did he talk to you about over the telephone?

A. Well, in one particular phone call he asked me if he could come up and see me. I says, yes.

Q. Well, on the other particular phone calls what did he [fol. 431] say to you?

A. Well, he might have said, "I am making great strides."

Q. Yes.

A. "Are you still with me?" I says, "I am to a certain extent; Fay is first."

Q. And he is second?

A. That is right.

Q. And you say he did come to your apartment?

A. Yes.

Q. And what was the conversation at your apartment?

A. Well, nothing in particular, outside of just repeating the same thing, that he is going along nicely.

Q. Now were you seeing other Democratic leaders during this period?

A. Yes.

Q. Other Assembly District leaders, that is?

A. That is right.

Q. And what are their names?

A. Clarence Neal.

Q. Leader of the 20th Assembly District?

A. Yes; Jimmie Kelly.

Q. Also known as James DiSalvio?

A. That is right.

Q. He is the leader of the 2nd Assembly District, isn't he?

A. Yes.

Q. Anybody else?

A. Dr. Sarubbi.

Q. And Dr. Sarubbi is leader of the 1st Assembly District?

A. The 1st.

Q. Anybody else?

A. Mr. Rosenthal.

Q. Yes; and he is the leader of the 8th Assembly District?

A. Yes.

Q. Now what instructions did you give these leaders with respect to Kennedy?

Mr. Sheridan: I object to the form of the question; not what instructions, but what conversation did you have?

[fol. 432] The Referee: Yes, it embodies an assumption. I will sustain it.

Q. Well, where were you seeing Neal at this time?

A. The Waldorf.

Q. Did you see him often?

A. Very often.

By Mr. Sheridan:

Q. Waldorf what?

A. Waldorf Hotel.

Q. Waldorf-Astoria?

A. Waldorf-Astoria Hotel and barber shop.

The Referee: How do you spell this man's name, Neal?

Mr. Hogan: It is N-e-a-l, Clarence Neal.

By Mr. Hogan:

Q. And what did you say to Neal with respect to Kennedy?

A. Well, I told Neal that—May I explain it my way, Mr. Hogan?

Q. If you wish to.

A. Mr. Neal had spoken to me about Fay; he was sort of managing Fay, his campaign; and I had committed myself, whatever help I could give to Fay.

Q. All right; with leaders?

A. That is right, whoever I knew that I could put a good word in for Fay; and I told him that if Fay did not have enough votes my second choice would be Mike Kennedy.

Q. Yes.

A. And he said, "Well, Mike is a nice fellow; in fact," he says, "if Fay hasn't got enough votes I will go along with Mike Kennedy myself."

Q. Did you say anything else to him?

A. Not that I can recall, nothing in particular.

[fol. 433] Q. You cannot recall anything else, Mr. Costello?

A. No, I don't think there is anything of importance that would register on my mind right now.

Q. Well, you do recall that you were questioned about this subject before the Grand Jury, do you not?

A. Yes.

Q. Now I ask you if this question and answer does not refresh your recollection—

Mr. Sheridan: No, I object to that. I ask your Honor, may the witness be shown the document for the purpose of reading the particular question, and then asked, "Does that refresh your recollection," rather than putting in the record.

Mr. Hogan: Your Honor, I think this is an open hearing, without a jury, and I don't see the point of it.

Mr. Sheridan: I do think that a witness, after he has exhausted his memory, may be shown any document,

any testimony, and then asked. I think that is the proper procedure.

The Referee: There is a certain amount of public interest in this case, and I dare say that the press is represented here. Is there any objection to following Mr. Sheridan's suggestion?

Mr. Sheridan: Show him the particular part of the Grand Jury minutes, rather than read it into the record.

Mr. Hogan: I do believe that the condition which ordinarily suggests such a precaution is not present. We haven't any jury, it is an open hearing, and I see no point to showing the question and answer to the [fol. 434] witness on each occasion; because I assume that there will be a number of occasions when memories will have to be refreshed.

The Referee: Yes.

Mr. Sheridan: Your Honor, may I be heard on that?

The Referee: Yes, I will hear you.

Mr. Sheridan: Anything that transpired before the Grand Jury we know is embodied in the Grand Jury minutes. We have no copy of that, and I know of no authority which would permit us to have a copy. Now whatever transpired before the Grand Jury, I claim, is separate and apart from this transaction. If Mr. Hogan wants to use those Grand Jury minutes either for the purpose of impeaching or contradicting even his own witness I shall not object to it, or if he wants to refresh his recollection all right; but not to try to get in indirectly into this record questions and answers that may have been propounded to this man when there was no semblance of a legal protection for him by way of objection being interposed.

The Referee: I suggest you follow the practice outlined by Mr. Sheridan. If you insist I think you may proceed as you wish, but nevertheless I suggest that you follow Mr. Sheridan's suggestion. It is just as easy to show him the question and answer.

Mr. Hogan: Well, your Honor, I will certainly defer to your recommendation, with the—

The Referee: This is not a ruling against your question.

Mr. Hogan: No. But I mean, your Honor, if we find that it becomes too cumbersome—

[fol. 435] The Referee: If it becomes too burdensome we will allow you to bring it up again.

Mr. Hogan: All right.

Q. Mr. Costello, would you read this question and answer at the bottom of page 350, the next to the last question and answer (showing witness volume)?

A. Yes, I have read it.

Q. Now does that refresh your recollection?

A. Yes, sir.

Q. You said it did?

A. Yes, sir.

Q. So that what else did you say?

A. I told Neal that if he did not get enough votes for Fay, if he thought he could not put him over, to go along with Kennedy; and I told Sarubbi and Kelly and Rosenthal that I would prefer—that is, I would consider it a nice thing if they went along with Neal, with whoever Neal would suggest.

Q. And you had indicated to Neal—

A. Yes.

Q. —whom you preferred?

A. That is right.

Q. And did you tell Kennedy what support you could give him?

A. Yes.

The Referee: Just read that whole answer, will you, Mr. Reporter?

(Answer read, "I told Neal that if he did not get enough votes for Fay, if he thought he could not put him over, to go along with Kennedy; and I told Sarubbi and Kelly and Rosenthal that I would prefer—that is, I would consider it a nice thing if Fay went along with Neal, with whoever Neal would suggest.")

Mr. Hogan: Is it clear to your Honor?

The Referee: It is.

[fol. 436] Q. Now did Neal vote for Kennedy?

A. Well, I don't know.

Q. Well, you have talked with him dozens of times since then, haven't you?

A. Well, I don't know whether he did or not.

Q. Well, did those leaders that you have mentioned vote for Kennedy?

A. Oh, for Kennedy? I beg your pardon, I am sorry, Mr. Hogan.

Q. Did they?

A. I had Fay in mind. Yes, yes. I am sorry.

Q. There wasn't any voting for Fay, was there?

A. Well, no, not of the ones that I have mentioned.

Q. Isn't it true that Fay withdrew before the voting took place?

A. Well, I take it he did.

Q. So that Neal, Sarubbi, Kelly and Rosenthal, all Assembly District leaders, voted for Kennedy?

A. Yes.

Q. And Mr. Kennedy was elected?

A. Yes.

Q. In April of 1942?

A. Yes.

Q. Did you see Mr. Kennedy shortly after the election?

A. Yes.

Q. And what did he say to you?

A. Well, he thanked me for my assistance, for my help.

Q. Now after April of 1942, when Mr. Kennedy was elected leader, did you continue to see him?

A. Occasionally.

Q. Well, didn't you see him frequently?

A. Well, I would say maybe once a week.

Q. Once a week. And you made appointments to see him?

A. In April?

Q. No, at any time thereafter?

A. Yes.

Q. And he made appointments to see you?

A. Yes.

Q. Now where would you see him? Where did you see him, I should say?

A. Well, I met him in a restaurant of the Waldorf, the [fol. 437] Norse Grill, which is a restaurant in the Waldorf Hotel.

Q. Yes.

A. We had luncheon. I met him at a race track.

Q. Yes. Can you recall any other places?

A. At his office.

Q. Did you see him at your home?

A. At my home.

Q. Any other hotel?

A. At the St. Regis.

Q. Yes. Do you recall any other?

A. I don't believe I do right now.

Q. Did you see him at the Madison Hotel?

A. I don't remember; I might have.

Q. Did you see him at the Essex House? You might have?

A. I might have.

Q. Did you see him at the Essex House?

A. One occasion in the lobby, yes.

Q. And your testimony is that you saw him about once a week on the average?

A. Approximately.

Q. And you have a partner, Phil Kastel?

A. Yes, sir.

Q. Did you and your partner entertain Kennedy in New Orleans?

A. No; Mr. Kastel did.

Q. Mr. Kastel did. Well, did Mr. Kennedy say anything you about it?

A. On his return, yes.

Q. Thanked you?

A. No. Well—well, yes; I would say he thanked me.

Q. Do you know Bert Stand?

A. Yes, sir.

Q. What position in the Democratic Party does he hold?

A. Secretary.

Q. Isn't he Secretary of the Executive Committee?

A. Right.

Q. And the Executive Committee is composed of the Assembly District leaders?

A. Yes, sir.

[fol. 438] Q. When did you meet him?

A. Shortly after Kennedy was elected leader of Tammany Hall.

Q. Who introduced you to him?

A. Kennedy.

Q. Do you recall where you met him?

A. The Norse Grill of the Waldorf-Astoria Hotel.

Q. On one of these meetings with Kennedy?

A. It was not exactly a meeting. I was shaved, and the barber shop is close to the Grill, and I go in there for lunch, and it was an accident that I ran into them.

Q. Well, did you and Mr. Stand and Mr. Kennedy have lunch that day?

A. I joined them at lunch.

Q. Then did you see Mr. Stand frequently after that?

A. Yes.

Q. Did he have your telephone number after that?

A. Yes, sir.

Q. Did he telephone you very often?

A. Yes.

Q. How long have you known Clarence Neal?

A. About 25 years.

Q. How long do you know Dr. Sarubbi?

A. About five years.

Q. How long do you know Mr. DiSalvio, also known as Jimmie Kelly?

A. About 25 years.

Q. And Mr. Abe Rosenthal, the leader of the 8th Assembly District, how long do you know him?

A. About five years.

Q. Now did you have any business transactions with Mr. Kennedy?

A. Never.

Q. Did you have any business transactions with Mr. Stand?

A. No, sir.

Q. Or Mr. Neal?

A. No, sir.

Q. Have you been in the headquarters of the Democratic Party in this county?

A. To my recollection I have been there once.

[fol. 439] Q. When was that?

A. I don't know just when, but it was after Neal—I mean Kennedy was elected.

Q. After Mr. Kennedy was elected, shortly after that?

A. Shortly after that.

Q. With any of the persons we have mentioned?

A. I had an appointment with Clarence Neal for luncheon, and I went up to the club—

Q. That was on 17th Street?

A. —on 17th Street, to meet him.

Q. And Mr. Neal showed you around, did he, conducted you around through the building?

A. Yes.

Q. When did you first meet the respondent, Judge Aurelio?

A. I think it was in the early part of the year, it might have been in February.

Mr. Sheridan: 1943?

The Witness: 1943.

Q. And where did you meet him?

A. At Jimmie Kelly's beefsteak dinner.

Q. And Jimmie Kelly is the leader of the 2nd Assembly District? We have had that established.

A. Yes, sir.

Q. Where was the beefsteak held?

A. I believe it was Webster Hall.

Q. And who introduced you to Judge Aurelio?

A. Dr. Sarubbi, I believe.

Q. Did you have a conversation with Judge Aurelio there? What did he say to you?

A. Nothing in particular, just an introduction.

Q. An exchange of—

A. (Interposing) Greetings and so forth.

Q. Greetings?

A. That is all. We made comments on the beefsteak; a [fol. 440] lot of people, nice people, and so forth and so forth.

Q. Yes. Was anybody else present when you met him?

A. I believe there was Major, a Major.

Q. Some Major?

A. I just don't recall his name, with Judge Aurelio and Dr. Sarubbi. That is all to my recollection at the present time.

Q. None of the persons, the political leaders that we have mentioned?

A. Abe Rosenthal might have been.

Q. Was Mr. Rosenthal there? Now did Dr. Sarubbi talk to you again about Judge Aurelio shortly after this beef-steak?

A. Yes.

Q. And how long would you say it was after the beef-steak, which you said was in February of 1943?

A. Maybe 10 or 15 days later.

Q. And what did Dr. Sarubbi say to you?

A. He asked me what I thought of Judge Aurelio. I said, "Well, he looks to me like a fine man." I said, "What makes you ask?" He said, "Well, I am rooting for him for a Supreme Court Judgeship, he is a very fine man and has a marvelous record; World War veteran, District Attorney for eight or nine years or seven," I just forget, "and Magistrate for ten years with two administrations, representative and democratic, and a fine lawyer, married and has two children."

Q. Dr. Sarubbi told you this?

A. That is right.

Q. Did you know any of this before that?

A. No.

Q. Yes. What did you say; or did he say anything else first, I should say?

A. He said, "Well, maybe you can help by talking to Clarence Neal or whatever leader that you know. We are going to put his name in, and we are looking for a little help."

Q. What else did he say?

A. Well, I just don't recall that now.

[fol. 441] Q. Did he mention any Democratic leader other than Neal?

A. Jimmie Kelly.

Q. Yes. Anybody else?

A. Not that I recall.

Q. Well now, you testified about this subject before the Grand Jury, too, did you not?

A. Yes.

Q. I show you the answer you gave on page 380—

A. Oh, and Mike Kennedy.

Q. Mike Kennedy.

A. I am sorry; Mike Kennedy.

Q. Thank you. Well, what did he say with respect to Kennedy?

A. Well, he said, "If you get a chance to talk to Kennedy, put in a good word for Judge Aurelio."

Q. And what did you say?

A. I told him I would.

Q. You would. And did you speak to Kennedy?

A. I did.

Q. What did you say to him?

A. I told him that I understand they are going to have an Italian on the ticket, and I was spoken to by Dr. Sarubbi, and I would appreciate, I imagine a lot of the leaders would appreciate, if he was on the ticket.

Q. You were not a leader?

A. A fine record; and I quoted what Sarubbi quoted to me.

Mr. Hogan: Will you read the last part of that; I am sorry, I did not get it, Mr. Stenographer.

(Last part of answer read, "And I would appreciate, I imagine a lot of the leaders would appreciate, if he was on the ticket.")

Q. What did Mr. Kennedy say when you told him this?

A. Well, he said he would give it deep consideration; he felt that he was going to have an Italian on the ticket [fol. 442] anyway, he knew of Judge Aurelio, and he thought he was a real fine man; he might be an honor to the ticket.

Q. And this was shortly after the Jimmie Kelly beef-steak, ten-days I think you testified, ten days or two weeks after that?

A. Well, not with Kennedy.

Q. Well, how long?

A. This was Sarubbi. With Kennedy maybe a week or two weeks later.

Q. I see. And did you speak to other leaders after talking to Dr. Sarubbi?

A. I spoke to Jimmie Kelly.

Q. What did you say to him?

A. I told him that it would be a nice thing if he recommended Judge Aurelio.

Q. And what did he say?

A. He said he knows Judge Aurelio, "I certainly will."

Q. Anybody else?

A. Neal.

Q. What did you say to Neal?

A. I practically told him the same thing.

Q. And what did Neal say?

A. He said he would.

Q. Did you talk to anybody else? By "he would" you mean he would back him, is that what you mean?

A. He would back him, yes, sir.

Q. Did you speak to anybody else?

A. Not that I recall.

Q. Did you speak to Stand?

A. Stand is not a leader.

Q. Did you talk to him?

A. Yes.

Q. He is Secretary of the Executive Committee, is he not?

A. Yes, sir. I spoke to him.

Q. And what did he say?

A. He said he would.

Q. Would do what he could for him?

A. Do what he could for him.

Q. Did you speak to Mr. Stand's leader, William Ahearn?

A. No, sir.

[fol. 443] Q. Did you speak to Neustein, leader of the 6th Assembly District?

A. No, sir.

Q. Did you speak to Abe Rosenthal, the leader of the 8th Assembly District?

A. Rosenthal spoke to me.

Q. About the same time, and what did Rosenthal—

A. He spoke—

Q. I beg your pardon?

A. He spoke to me after Sarubbi spoke to me.

Q. Yes. And what was the conversation you had with Mr. Rosenthal?

A. Rosenthal said to me, "I notice you met Judge Aurelio, and he is a fine man;" and he practically gave me his history.

Q. Was that the same night or after the beefsteak?

A. After, this is after the beefsteak; and he was going to make him his candidate for Supreme Court.

Q. Judge Aurelio comes from Mr. Rosenthal's district, by the way?

A. Yes. I said, "Well, I heard all about it, Dr. Sarubbi already has spoken to me. I am going to go along if I can help him any way."

Q. And do what you can for him?

A. Do what I can.

Q. Now will you tell us where you next met Judge Aurelio?

A. I believe I met him at Abe Rosenthal's corned beef and cabbage, he called it, dinner.

Q. Wasn't that in June?

A. Well, then I might have—

Q. Didn't you meet him in March?

A. In March, at my home.

Q. Didn't you meet him somewhere else before you met him at your home?

A. At Abe Rosenthal's daughter's wedding.

Q. Didn't you meet him somewhere before that? Didn't you meet him at Mr. Kennedy's office?

A. Oh, yes. Well, I have got my dates wrong. Yes, I met him.

[fol. 444] Q. Isn't it true that the next time you met him after the beefsteak—

A. Well, that is the next time, yes, that would be the place.

Q. Well, isn't that your recollection?

A. Well, now it is, yes.

Q. You met him at Mike Kennedy's office?

A. Yes.

Q. And where is that?

A. It is in the General Motors Building.

Q. On Broadway?

A. Broadway and 57th Street.

Q. This would be in March of 1943?

A. In March, I presume, yes.

Q. And who was present at this meeting?

A. Mike Kennedy.

Q. Yes.

A. Judge Aurelio.

Q. Yes.

A. Abe Rosenthal, Dr. Sarubbi, Bert Stand. I myself and Clarence Neal went to the office and—

Q. Clarence Neal was there also?

A. No, we went to the office. I and Clarence Neal went to the office, and found this group that I just mentioned there.

Q. Yes; that is, Dr. Sarubbi, Mr. Kennedy, Mr. Rosenthal, Judge Aurelio, Mr. Stand, and then you and Clarence Neal joined that group?

A. Later.

Q. This is in Mr. Kennedy's office, in the General Motors Building, in March of 1943. Now tell us what the conversation was?

A. We went into the office as this meeting was breaking up. They were about leaving, so I—

Q. I did not ask you that. I asked you what the conversation was that you heard. Naturally you cannot testify to any conversation that transpired before you got there. What was the conversation in the office that you heard?

A. I didn't hear much of a conversation.

[fol. 445] Q. What was it?

A. I was told when I went in there that they were there for the specific purpose of talking to Kennedy on Aurelio's behalf.

Q. Who told you that?

A. Well, one of them; it might have been Bert Stand, it might have—one of them, maybe Dr. Sarubbi.

Q. Yes. What else was said?

A. Well, I said, "That is a very fine thing."

Q. How long were you there?

A. About ten minutes.

Q. And what did Mr. Kennedy say to you?

A. He said he was going to give it a lot of consideration.

Q. What?

A. About Judge Aurelio being a candidate.

Q. What did you say to Mr. Kennedy?

A. Well, I would appreciate it.

Q. If—

A. He will do honor to the ticket.

Q. What was that about "appreciate it"?

A. I would appreciate it; he would do honor to the ticket.

Q. Appreciate what?

A. That he would give him consideration.

Q. Who?

A. Judge Aurelio.

Q. You said that to Mr. Kennedy?

A. Yes.

Q. Did you also remind him that you had spoken to him before about Judge Aurelio?

A. I did not remind him; I just took it for granted he knew.

Q. What did you say to Judge Aurelio?

A. I don't believe we had any conversation at all, outside of exchanging greetings.

Q. What did you call him at that time?

A. Judge.

Q. Didn't you call him Tom?

A. I might have called him Tom, but not that I recall.

Q. I beg your pardon?

A. Not that I recall.

[fol. 446] Q. Well, you did after that, didn't you?

A. Yes.

Q. You called him by his first name?

A. Yes.

Q. What was your conversation with Judge Aurelio at this time?

A. At that particular time?

Q. Yes.

A. We didn't have much of a conversation; exchanged greetings.

Q. Did you have any conversation?

A. Not that I recall.

Q. Did he say anything to you?

A. He may have repeated to me, "I would appreciate it if you keep punching for me, root for me."

Mr. Hogan: Will you repeat that last?

(The last answer was read.)

Q. Well, did he say that?

A. Well, he might have.

Q. Is that your best recollection, that he said that?

A. That is my best recollection, yes.

Q. Then he knew that you had been continuing to punch for him, is that right?

A. Yes.

Q. Did he thank you for doing that?

A. Well, he didn't—yes, naturally.

Q. And he asked you to continue punching for him?

A. Yes.

Q. And Mr. Kennedy said that he would consider it?

A. Yes.

Q. By the way, do you belong to any Italian Societies?

A. No, sir.

Q. You are not a Society man?

A. No, sir.

Q. Did you tell Judge Aurelio that you could get Italian societies to support him?

A. I might have told him that I would try.

[fol. 447] Q. You don't belong to any Italian societies, do you?

A. No, I do not.

Q. Now the question is, did you tell him, do have any recollection that you told Judge Aurelio that you could get support for him from Italian societies?

A. I have no recollection, but I say I might have, it is possible.

Q. Even though you don't belong to any?

A. I do not.

Q. You testified about this before the Grand Jury, did you not?

A. To my best recollection, yes.

Q. Now I ask you if you did not give this answer to the question I am about to read:

"Q. You didn't tell Aurelio that you could get societies to support him?"

"A. No."

Now did you give that answer?

A. Yes.

Q. And was that a truthful answer?

A. Yes.

Q. Now where did you next see Judge Aurelio?

A. What month are we talking about?

Q. Well, you have told us about the meeting at Mr. Kennedy's office in March. Now where was the next meeting?

A. The next meeting was at my home, I believe.

Q. At your home. Now how did that come about?

A. Abe Rosenthal spoke to me about Judge Aurelio, said I should know him a little better, he is a very fine man.

Q. Yes.

A. I said, "Some day bring him up to my home or some evening for dinner, your Mrs. and his Mrs. come up."

Q. I see.

A. He said, "All right, I will let you know." A few days later he called me.

Q. Who called you?

A. Rosenthal.

Q. Yes.

A. He said, "We will accept the invitation." They came to my home for dinner.

Q. Now who was present at your home on that occasion?

A. Mr. and Mrs. Neal.

[fol. 448] Q. That is, Clarence Neal, the district leader?

A. That is right.

Q. And his wife?

A. That is right.

Q. Who else? Well, who came with Judge Aurelio?

A. Mr. Aurelio, Judge Aurelio, and Mrs. Aurelio.

Q. And weren't the Rosenthals there also?

A. Yes, Rosenthal and Mrs. Rosenthal.

Q. And Mrs. Rosenthal. Now how long did you remain at your home? How long did the company remain at your home?

A. Oh, I would say about an hour.

Q. And where did you go from your home?

A. Then I called up and made reservations at the Copacabana Restaurant for dinner.

Q. And all of those you have mentioned went to the Copacabana?

A. Yes, sir.

Q. What time was it you got there, about?

A. A little after seven.

Q. And how long did you remain there, you and Judge Aurelio and the others?

A. Oh, I would say until about ten o'clock.

Q. About three hours?

A. Yes.

Q. Now when was the next meeting after the meeting at which you met at the Copacabana?

A. The next meeting was in March.

Q. Yes, and what was the occasion?

A. At the Rosenthal's wedding.

Q. You mean Mr. Rosenthal's daughter's wedding?

A. Mr. Rosenthal's daughter's wedding.

Q. Yes. And Judge Aurelio was present?

A. Yes.

[fol. 449] Q. And you were there?

A. And about a thousand others.

Q. And you talked to him?

A. Well, I—yes.

Q. During this period after the meeting at Mr. Kennedy's office, did you talk to Judge Aurelio about the nomination?

A. I don't believe I did.

Q. On one of these occasions didn't you talk to him about the nomination?

A. I don't believe I did.

Q. Well, didn't you talk to him about his chances for the nomination in March?

A. In March?

Q. In March or April?

A. I might have.

Q. I show you questions and answers at page 395, and ask you if they do not refresh your recollection, beginning here (indicating), at almost the bottom of the page.

A. Yes.

Q. The answer is that you did speak to him in March?

A. Yes.

Q. And what did you say when he asked you how his chances were?

A. Well, I probably—he asked me, “What do my chances look like?” I said, “Well, I am rooting for you, I have an awful rooting interest, and I am punching for you. It looks like your chances will be all right.”

Q. And that was after speaking to Kennedy?

A. That is right.

Q. And you continued to speak to Kennedy?

A. That is right.

Q. And were you talking to Mr. Rosenthal during this period also?

A. Well, I might have met Rosenthal.

Q. And you would tell him about the same thing?

A. Yes, I imagine I would have.

Q. And you told Judge Aurelio that you were going to continue to work for him?

A. Yes.

[fol. 450] Q. Now did Dr. Sarubbi speak to you about Judge Aurelio in March and April and May, those months?

A. Yes.

Q. Did he speak to you often about him?

A. As often as I have seen him.

Q. And what did he say to you?

A. Told me that his chances looked very good, that he is out trying to convert as many executives—that is, on the Committee, as possible.

Q. And what did you say?

A. I told him that I was doing the same thing; I spoke to Kelly and Neal and so forth and so on.

Q. And weren't you seeing Dr. Sarubbi quite often during this period?

A. Yes. Well, he was treating me, he was coming up often, yes.

Q. That is before Dr. Sarubbi became ill?

A. That is right.

Q. All right. Now can you tell us when the next meeting with Judge Aurelio was?

A. At the Martinique.

Q. I beg your pardon?

A. Martinique Restaurant.

Q. No. Just to refresh your recollection, didn't you meet him at the corned beef and cabbage dinner? I think you have testified to that?

A. I did testify to that.

Q. Yes.

A. Yes.

Q. That was in June, wasn't it?

A. In June, yes.

Q. And whose dinner was it?

A. Rosenthal's.

Q. He is the leader of the 8th Assembly District?

A. That is right.

Q. And this was a district gathering, isn't that true?

A. A district gathering.

Q. And was Mr. Kennedy there?

A. No.

Q. Was Judge Aurelio there?

A. He was there.

[fol. 451] Q. And you had a conversation with Judge Aurelio?

A. A very short conversation.

Q. Along the same lines as we had before?

A. No, we did not; I did not talk politics at all.

Q. And he did not?

A. No, sir.

Q. I believe you testified that you were seeing Kennedy frequently between March and July, is that right?

A. Yes.

Q. And Neal?

A. Yes.

Q. And Bert Stand?

A. Yes.

Q. And you were talking to Mr. Kennedy about Judge Aurelio?

A. I spoke to him, yes.

Q. Plugging and punching for him, I think those are your words?

A. That is right.

Q. Now do you recall a conversation with Mr. Kennedy in June or July about Judge Aurelio, on the subject of a promise?

A. I believe I do.

Q. Well, tell us; and would you say that was in June or July?

A. Yes, I believe it was June or July.

Q. Tell us what—

A. (Interposing) I got a phone call from Bert Stand.

Q. Yes.

A. And he told me that Kennedy was thinking of putting an Irish Catholic on the ticket. Bert Stand said, "You ought to talk to that fellow, because he is—in other words, he is cooling off on the Italian candidate." I told him I would.

Q. And did you see Mr. Kennedy?

A. I saw Mr. Kennedy.

Q. And what did you say to him?

A. I said, "I understand that you are sort of cooling off on Aurelio."

Q. Yes.

A. I said, "You made a promise, you should live up to it. You are a Tammany Hall leader, your word should be [fol. 452] your bond. I know my word is my bond. You made a commitment and should live up to it." Kennedy said he never had any ideas of not living up to it.

Q. And did he give you a promise at that time?

A. I believe he gave me a promise at the time, yes. In order for me to tell him that he must have given me a promise.

Q. Well, when did he first make the promise to you? Because you have just testified that you told him, "A promise is a promise, and you ought to live up to it." When did he first make it to you?

A. Well, he must have made it prior to that.

Q. That would be some time in April?

A. April or the early part of June.

Q. And what did he say in April or the early part of June?

A. He says he would give it a lot of consideration.

Q. Did he make you a promise he would nominate Aurelio?

A. Later he said that "I am going to put him on the ticket."

Q. Well, can we say definitely that in June or July he told you that he was going to put Judge Aurelio on the ticket for the Supreme Court?

A. You can say definitely that before I spoke to him on that subject, about him changing his mind, that he made a promise that he was going to put him on the ticket.

Q. To you?

A. That is right.

Q. All right. Did you speak to Mr. Kennedy about primary contests at any time?

A. No. We might have spoke casually about, there was a lot of contests.

Q. Difficulties he was having? Do you remember whether you were in New York on primary day, August 10th?

A. I was not in New York.

Q. Do you recall when you came back to New York after primary day?

A. I might have come back the following day or two days [fol. 453] later or something, very shortly, maybe the next day.

Q. You mean August 11th or 12th?

A. Yes.

Q. Now do you remember Bert Stand telephoning a day or two days after primary day?

A. Yes.

Q. And what did he say to you on the subject of judicial nominations?

A. Well, I believe it was on the same subject, that Kennedy was cooling off again, or something.

Q. Yes. And did you see Mr. Kennedy after Mr. Stand had told you that he was cooling off?

A. Yes.

Q. And what did you say to him?

A. I reminded him.

Q. Of the promise?

A. Of the promise.

Q. And what else did you say about the promise?

A. Well, I told him, "Now you have got to be either man or mouse. Come out with it. Are you really going to go along with it? If not, declare yourself."

Q. And what did he say?

A. "You are the boss of Tammany Hall, you are the boss so do what you please, but at least come out with it."

Q. And what did he say to that?

A. He told me he was definitely going to have him on the ticket.

Q. In other words, he repeated the promise?

A. Yes.

Q. Do you know whether or not Dr. Sarubbi was sick during this period?

A. He was.

Q. This was after primary day, August 11th?

A. Yes.

Q. And the Judicial Convention, you recall, was August 23rd, isn't that true?

A. Right.

Q. The Democratic Judicial Convention. Now did you talk to Dr. Sarubbi over the telephone on the subject of Judge Aurelio?

A. I don't believe I did.

Q. Did he telephone you?

A. No, sir.

Q. About ten days before the Convention?

A. No, sir.

[fol. 454] Q. I show you your Grand Jury testimony on page 400. Will you read that and tell me if it refreshes your recollection (handing witness volume)?

A. Where is it?

(Mr. Hogan indicates.)

A. (Continued) Yes, I remember. I don't remember the conversation, I remember him calling me.

Mr. Sheridan: Would your Honor let us have a drink for five minutes?

The Referee: What did he say?

Q. On this subject of Judge Aurelio?

A. Well, I just don't remember on the subject of Judge Aurelio.

Q. You do remember him calling you?

A. Calling me.

Q. Well, do you recall any reference to a Mr. A. over the telephone?

Mr. Sheridan: Now I object to that, your Honor. That is accomplishing indirectly, getting in complications. Let him ask, instead of Mr. A—

The Referee: Yes, but has he not exhausted his recollection? He first says that he has no recollection of talking about, or what the talk was with Mr. Sarubbi. Now he is calling attention to a Mr. A. I will allow that, on the ground that his recollection is exhausted.

Mr. Sheridan: Your Honor, there is no proof here; in other words, if I spoke to you you would recognize my voice if you had known me—

The Referee: It may be an entirely immaterial matter, Senator.

Mr. Sheridan: All right.

[fol. 455] The Referee: I appreciate that. It is very difficult to tell what these conversations amount to.

Mr. Sheridan: Any conversation of my client is perfectly all right, any conversation with Judge Aurelio.

The Referee: Yes, I know.

Mr. Sheridan: But with a witness or somebody saying, "Yes, I said it," you could prove almost anything.

The Referee: That is true.

Mr. Sheridan: You could do a terrific smear job, you know, by just phrasing questions, and there is no way out of it.

Mr. Hogan: Mr. Sheridan, I am asking the witness, he admits that he had a conversation.

Mr. Sheridan: Surely, and then you are incorporating in your question what purports to be embodied in a telephone communication.

The Referee: No, as I understand it, the witness has said that there was a telephone conversation, but that he cannot recall the contents of that conversation.

Now in order to refresh his recollection, he having said he had nothing in mind, the District Attorney asks, was there something about a Mr. A.? Now that can be answered yes or no.

Q. Do you recall that there was a telephone conversation with Dr. Sarubbi, in which Dr. Sarubbi referred to a Mr. A., and you referred to a Mr. A.?

A. No.

Q. You don't?

A. I recall of Dr. Sarubbi calling me, and I don't remember the conversation. That is the day I went down to meet him, down to his home to visit him.

Q. You went to his home?

A. To his home, to visit him.

[fol. 456] Q. You have no recollection of the conversation?

A. No recollection of the conversation on the telephone.

The Referee: Now Mr. District Attorney, just a moment here. What hours are customarily held in this Court House?

Mr. Hogan: I am sure that your wishes will be most agreeable to Senator Sheridan and me.

Mr. Sheridan: What they usually do is, they work until one or until the Judge gets too tired, and then he takes a five minute recess at about 12:00 o'clock, and re-convenes the Court with all convenient speed, about ten after twelve; and he does the same thing in the afternoon, and you finish about 4:00 or 4:30. If your Honor wants to work late it is perfectly agreeable.

Mr. Hogan: Perfectly.

The Referee: Well, we will take a short recess now, for five minutes.

Mr. Sheridan: Thank you.

The Referee: And then we will go on until one o'clock.

(Short Recess.)

FRANK COSTELLO, resumed the stand:

By Mr. Hogan (Continuing):

Q. Now, Mr. Costello, do you recall speaking to Bert Stand on the telephone again, on the subject of the Judicial Convention, about a week before the convention—a [fol. 457] week or ten days before the convention?

A. I believe I do.

Q. And what did he say to you on that occasion? What did Stand say to you?

A. I believe he spoke about Mike Kennedy again.

Q. What did he say?

A. That he was sort of trying to detour from Aurelio.

Q. And what else?

A. And that I should have another talk with him.

Q. Well, did Stand say he had talked to Kennedy?

A. I don't remember that, Mr. Hogan.

Q. Well, was this his own idea, Stand's, or was he talking to Kennedy?

A. Oh, yes, Kennedy must have spoken to him on the subject.

Q. Didn't he tell you he had talked to Kennedy?

A. I believe he did, yes.

Q. And you say that he indicated that Kennedy was attempting to detour from the promise, is that it?

A. That's right.

Q. Now, did Mr. Stand say anything about to whom he was detouring?

A. For Irish Catholic or something.

Q. Did he mention any name?

A. No.

Q. Did he say anything else to you?

A. Well, I just don't recall the conversation, but he did tell me I should see him and pin him down to it, or something—you know.

Q. Well, now, I want to show you your Grand Jury testimony at page 403 and ask if that doesn't refresh your recollection (showing volume to witness)?

A. Yes.

Q. Well, now, your recollection having been refreshed,

what else did Kennedy, or did Stand say to you on the subject?

A. Well, that if I stand pat, that it would be all right.

[fol. 458] Q. Did he say anything to you about "Irish Charm"?

A. That he has got that "Irish charm" or something—"It's the Irish charm again," or something of that sort; "don't let him talk you out of it."

Q. And that you were to stand pat?

A. Stand pat, that is right.

Q. Now, did you see Mr. Kennedy after this conversation with Bert Stand?

A. I believe I did.

Q. Do you recall when you did?

A. No.

Q. Well, was it a day or two later?

A. It could be.

Q. Is that your recollection?

A. Yes.

Q. And where did you see him?

A. I don't recall right now just where I saw him, but I do recall seeing him and talking to him on the subject.

Q. Well, let's see if we can fix the date. Do you recall meeting Mr. Kennedy at Longchamps' Restaurant?

A. Yes.

Q. Now, you recall testifying to that. That was on Tuesday, August 17th, about six days before the convention?

A. Yes, I believe it was.

The Referee: How many days?

Mr. Hogan: Six.

Q. And this meeting that we are talking about occurred before the Longchamps' meeting, didn't it?

A. I believe, yes. I believe so.

Q. But you don't recall where?

A. I don't recall where.

Q. Now, what did you say to Mr. Kennedy on this occasion?

A. Oh, I probably told him—I couldn't give you the exact words, but I tried to emphasize it, as I did prior to that.

[fol. 459] Q. You told him that he had made a promise to you, and that he had to keep it?

A. That's right.

Mr. Sheridan: Now, the witness didn't testify to that.

Mr. Hogan: I think he testified to that before, Senator Sheridan.

Mr. Sheridan: Now, ask him what he said, not what you think he said.

Q. Tell us then what you said to Mr. Kennedy at this time, on or about August 16th.

A. Well, I couldn't give you the exact words—

The Referee: No, in substance.

Q. Give us the substance.

A. I might have told him, "I understand you are trying to get away from Aurelio, and you want to put an Irish Catholic or something on the ticket."

Q. Yes?

A. And he said, "No, I am going to go along with him."

Q. Anything else?

A. Not that I recall.

Q. So he reassured you at this time?

A. Practically.

Q. Did you tell Mr. Kennedy what Mr. Stand had told you?

A. I don't recall. I might have, but I just don't recall.

Q. Well, if you did, did you tell Mr. Kennedy that it came from Mr. Stand?

A. If I did, yes. I probably would have.

Q. Did you tell Mr. Stand thereafter what Mr. Kennedy had told you?

A. Yes.

Q. That Judge Aurelio was to be on the ticket?

A. That is right.

[fol. 460] Q. Now, do you recall seeing Mr. Rosenthal about this time?

A. What dates? You are in where?

Q. This is on or about August 16th; August 16th was a Monday. Do you remember meeting him at the Waldorf?

A. Well, I don't know the exact date, but I met him there quite often.

Q. About that time?

A. Around that time.

Q. And what was the conversation you had with Mr. Rosenthal on the subject of Judge Aurelio?

A. Well, the conversation might have been that his chances looked very, very bright.

Q. You told that to Mr. Rosenthal?

A. Yes.

Q. Now, you recall that you had a meeting at Long-champs on Tuesday, August 17th?

A. Yes.

Q. With whom?

A. With Mike Kennedy, Clarence Neal and Bert Stand and myself.

Q. Four of you. And what time was the meeting set for?

A. 10:00 A. M.

Q. And who made the appointment?

A. The appointment was made, I believe, the day previous by Bert Stand.

Q. Was the time for the meeting changed on Tuesday?

A. Yes, sir.

Q. And who suggested that the time be made earlier or later?

A. Mr. Kennedy.

Q. And was it later?

A. Later.

Q. What time was it changed to?

A. Oh, changed to about 11:00, 11:30, I presume.

Q. Now, was that—did you have a conversation with Mr. Kennedy early that morning?

A. Yes.

[fol. 461] Q. And was anything said about changing the time, in the conversation?

A. Yes, sir.

Q. Well, suppose you tell us what Mr. Kennedy said to you?

A. Mr. Kennedy called me about 9:00 A. M.

Q. Yes.

A. And said, "We have an appointment at Longchamps"—I believe it was 11:00 or 11:30, and he says—no, 10:00 o'clock. He says, "Can you push it back for 11:00 or 11:30?" I says, "What's on your mind?" "Well, I prefer to see you alone first."

Q. Yes?

A. That is all.

Q. Now, did you then call Bert Stand?

A. So I said, "I'll arrange it. I will call Bert Stand."

Q. And you called him?

A. And I called Bert Stand.

Q. Now, when you spoke to Bert Stand, did Mr. Stand say anything to you about the Judicial Convention?

A. That particular morning?

Q. Yes.

A. No.

Q. You have no recollection of Mr. Stand saying anything to you about the Judicial Convention?

A. No, sir.

Q. Well, I show you this Grand Jury testimony on page 414 (indicating). I observe on page 413 that it has reference to the telephone conversation, and on page 414 (indicating)—

A. Well, he might have. I believe he did.

Q. Well, what is your recollection of what he said at this time?

A. I believe he says that Kennedy was in the same frame of mind, and he had Fay in mind, or one of Fay's candidates, or something.

Q. He had to do something for Fay?

A. Something, yes.

Q. That is Congressman Fay?

A. Congressman Fay.

[fol. 462] Q. The leader of the 12th Assembly District?

A. 12th Assembly.

Q. Well, did you say anything with respect to Judge Aurelio in connection with Congressman Fay's candidate?

A. No.

Q. Did you see Mr. Kennedy that morning before he go to Longchamps?

A. Yes.

Q. Where?

A. At my home.

Q. Now, did you say anything to Mr. Kennedy with respect to the conversation you had with Stand on the subject matter of Fay's candidate for the Supreme Court?

A. No.

Q. You did not?

A. No, not that particular morning, no.

Q. Now, I show you your Grand Jury testimony again, bottom of page 414 (indicating)—

A. Well, I might—

Q. And the top of page 415 (indicating).

A. Yes.

Q. You did discuss it that morning?

A. Yes, yes.

Q. Well, tell us what you said.

A. I told him—the substance is that there was a rumor around of him going with Fay for Byrnes.

Q. And whom did you mean by Byrnes?

A. Byrnes is a City Court Judge, I believe.

Q. Yes.

A. I don't even know the gentleman.

Q. And what else did you say?

A. And he told me, he says, "No, he was going with Aurelio.

Q. So he reassured you again that he was going for Aurelio?

A. That's right.

Q. Did you tell him you got this information from Stand?

A. I don't remember if I told him from Stand or who I got it from.

[fol. 463] Q. Now, what time was it you met him that morning?

A. It might have been around 10:00 o'clock.

Q. And there wasn't anybody else present—just you and Mr. Kennedy?

A. That's right.

Q. That is at your home?

A. At my home.

Q. Now, did you and he go from there to Longchamps?

A. Yes, sir.

Q. What time did you get there?

A. 11:00, 11:30.

Q. Was Mr. Neal and Mr. Stand in Longchamps also?

A. Yes.

Q. Well, what conversation did you and Mr. Kennedy and Mr. Stand and Mr. Neal have in Longchamps?

A. Mr. Kennedy called me at 9:00 o'clock and told me to push that appointment. And I told him that I would call upon Bert Stand and he could call upon Clarence Neal, "and have him also call you"—let it appear it was my suggestion to push it back to 11:00 or 11:30—because he wanted to talk to me alone.

Q. "You" in this case meaning Mr. Kennedy?

A. That's right.

Q. Go ahead.

A. Which was done. And about 10:00 o'clock Mr. Kennedy comes to my home. He said, "The reason I want to talk to you alone is because I have something to say about Dr. Sarubbi. He is a very sick man, and his District is going to the dogs. And I'm a new leader, I want to build up the organization, and I think he should resign."

Q. This is in addition to your conversation about Judge Aurelio?

A. That's right.

Q. Yes?

A. "I think he should resign." He says, "Now, I made an appointment this morning, thinking that I would make the suggestion, but I haven't got the nerve, because Clarence [fol. 464] Neal is going to be there, and he being the leader, it don't look so good for me." He says, "I wish you would do me a favor, being that Sarubbi is a very dear friend of yours—suppose you make the suggestion."

Q. Mr. Kennedy, the leader of the Democratic Party in this County, asked you to suggest to Clarence Neal—

Mr. Sheridan: Now, your Honor, are we going to have an unnecessary repeating of the question?

The Referee: No, I don't think so.

Mr. Sheridan: You understand it. I understand it—

Mr. Logan: Maybe I don't understand it.

Mr. Sheridan: Oh, I think you do.

The Referee: I think the question has been fully answered. If there is anything more you want to ask about it, go ahead and ask it. He has said that Kennedy asked him to suggest to Sarubbi his resignation—Sarubbi's resignation.

Q. I withdraw the partly framed question then, and ask you if anything else was said at that time.

A. I told him, I didn't think it was right, "But I will bring the subject up not to embarrass you."

Q. How long had Dr. Sarubbi been sick?

A. Quite some time now, a few months.

Q. Months in August? Hadn't you been seeing him in July?

A. Yes.

Q. Didn't you ask him to make telephone calls for you in July to California?

A. Yes. Well, he got sick after that.

Q. After July?

A. That's right.

Q. And this is August 17th, so it would be more nearly [fol. 465] a month, wouldn't it?

A. Oh, yes. Well, I say months, I mean months to date.

Q. Oh, I see. Now, at Longchamps what was the conversation between you and Mr. Kennedy, and Mr. Neal and Mr. Stand?

A. Well, when we got to Longchamps I was the one that suggested, I says, "Mike, it looks like the doctor is in very bad health. I think we should tell him—that is, I will tell him to resign; it is better for him, he should be no leader; he is too sick"—which I never did tell Dr. Sarubbi.

Q. And what did Mr. Kennedy say?

A. (Continuing) And never intended to tell him.

Q. You didn't tell that to Mr. Kennedy?

A. No, I didn't tell that to him, no. I was practically deceiving him, because I didn't have the nerve.

Q. Yes. What else was said?

A. He says, "Well, I don't think it would be a bad idea."

He says, "I was going to suggest it myself, but I didn't think it was fair. I am glad it comes from one of his dear friends."

Q. This is Mr. Kennedy saying this?

A. That's right.

Q. What did Mr. Neal say?

A. Oh, Mr. Neal objected to it. He thought it was out of line, that it wasn't fair, and just made some comments on it.

Q. Now, how long were you there at Longchamps?

A. Oh, I don't know; maybe an hour, an hour and a half. I don't know.

Q. Any conversation about Judge Aurelio?

A. No.

Q. No further conversation between—

A. No.

Q. (Continuing) —you and Mr. Kennedy?

A. Not that I recall.

Q. After your meeting at Longchamps on Tuesday, August 17th, do you recall Bert Stand telephoning you once more about Judge Aurelio?

A. (No answer.)

Q. Let me make it more specific: Do you recall that [fol. 466] on Thursday, August 19th, you were at the Martinique Night Club?

A. Yes.

Q. That is four days before the Judicial Convention. Do you recall Bert Stand telephoning you on Thursday morning, August 19th?

A. I don't recall that, unless you refresh my memory.

Q. Now I show you—

Mr. Sheridan: Mr. Hogan, I take it you are only showing him his own testimony, not Mr. Stand's testimony?

Mr. Hogan: No. This is Mr. Costello's testimony.

Q. I show you your testimony before the Grand Jury on page 416 at the bottom (indicating), and going over to 417.

A. I don't remember—

Q. Well, just tell us what parts of it you do remember.

A. I don't remember that at all, Mr. Hogan. I might have—we might have had a conversation, but I just don't know the substance of the conversation.

Q. You do recall a conversation with Mr. Stand that morning?

A. He might have called me.

Q. Do you deny that he called you that morning?

A. No, I wouldn't denying it.

Q. Will you give us to the best of your recollection what he said on Thursday morning, the day you had the party at the Martinique?

A. No, I couldn't give you—I don't recall.

Q. Didn't you give this question—wasn't this question asked you, and didn't you make this answer before the Grand Jury—

Mr. Sheridan: Now—

Mr. Hogan: This is just, Senator, as to an admission [fol. 467] of the conversation. There is nothing about the conversation there. "The 19th, the morning of the day you celebrated at the Martinique." That is the form of a question. And the answer is, "Well, I really don't know how to explain that. I will admit to the conversation."

Q. Now, didn't you testify in that fashion?

A. Yes.

Q. And that was truthful?

A. If it is there, it's truthful, yes.

Q. Now, you did admit to the conversation at that time?

A. Yes.

Q. You haven't any recollection at the present time?

A. No.

Mr. Hogan: Your Honor, I would like permission to read the conversation to see if it refreshes his recollection.

The Referee: Have you shown it to him?

Mr. Hogan: Yes.

Q. You wish to read it again—

The Referee: Well, he hasn't answered the question definitely, whether it does or does not refresh his recollection.

The Witness: Is this the morning after the Martinique?

Q. This is the morning of the Martinique.

A. Oh, the morning—

Q. Will you read beginning at the bottom of page 416 (showing volume to witness)?

A. I don't recall that conversation.

[fol. 468] The Referee: It doesn't refresh your recollection?

A. No, sir.

Q. Did you see Mr. Kennedy on that day, on Thursday?

A. Yes.

Q. Did you speak to him again about Judge Aurelio?

A. No, sir.

Q. You are sure you didn't—

A. Oh, I told him that I had a dinner appointment with Judge Aurelio—would he join me?

Q. Yes.

Mr. Hogan: Excuse me just a moment—

The Referee: Certainly.

Q. All right. You say that you didn't talk to Mr. Kennedy about Judge Aurelio on Thursday before the meeting in the Martinique?

A. I don't believe I did.

Q. Well, I show you testimony at page 419, your testimony (indicating), and over here on page 420 (indicating).

A. Yes. That is the day before.

Q. No. Doesn't it say there you saw Kennedy that day before you went to the Martinique?

A. Yes. The day of the Martinique.

Q. Yes. That is what I am asking you. Before you went to the Martinique, did you have any conversation

with Kennedy about Judge Aurelio? Does that refresh your recollection, the testimony on page 420?

A. Yes. Well, I thought I testified to that. Well, that is the day before the Martinique.

Q. The day before the Martinique.

A. Yes.

Q. But after Longchamps, which was Tuesday, and the Martinique was Thursday?

A. That is right.

[fol. 469] Q. So that would be Wednesday, August 18th?

A. That is right.

Q. Now, tell us what you said to Mr. Kennedy and what Mr. Kennedy said to you on August 18th, Wednesday.

A. Well, I just repeated the same rumors about Judge Aurelio.

Q. And was that because you had another conversation with Mr. Stand?

A. Yes. Because Mr. Stand told me that—I believe that he spoke to Roosevelt or something—President Roosevelt and Roosevelt had suggested someone else.

Q. Who spoke to President Roosevelt?

A. Mike Kennedy.

Q. About whom?

A. About putting somebody on the ticket.

Q. Who?

A. Gavegan, or someone.

Q. Do you mean Stand told you that?

A. Yes.

Q. Did he say that that had happened, or that is what Mr. Kennedy is going to tell you?

A. That is what Kennedy was to tell me.

Q. And what did you say—this is what Stand told you?

A. Yes.

Q. And then you spoke to Kennedy?

A. I spoke to Kennedy.

Q. And you told him you had heard that?

A. Yes.

Q. And what did he say?

A. He said, "No, I'm going to go along with Aurelio."

Q. So that this was another time he reassured you?

A. Yes, that's right.

Q. Now, did you call Judge Aurelio on Thursday, August 19th, four days before the convention?

A. Yes.

[fol. 470] Q. At his home?

A. At his home.

Q. And what did you say to him?

A. I invited him for dinner.

Q. Where?

A. At the Martinique.

Q. This was after Mr. Kennedy had told you finally that Judge Aurelio was to be on the ticket?

A. Yes.

Q. Did you invite anybody else to the Martinique?

A. I told the Judge, Judge Aurelio, to invite Abe Rosenthal, his leader.

Q. Yes?

A. He told me he would try, but they had an executive meeting on Thursday, and he didn't think he could make it. "But I'll try."

Q. Did Judge Aurelio and Mr. Rosenthal come to the Martinique?

A. Yes.

Q. Where is that, by the way?

A. It's on 57th Street, off of 6th Avenue.

Q. And was Mr. Kennedy also there?

A. Yes.

Q. Mr. Stand?

A. Yes.

Q. Mr. Neal?

A. Yes.

Q. And what conversation did you have with Mr. Kennedy at that time?

A. No conversation of any importance politically.

Q. You had met him at some bar just previous to that, had you not?

A. Yes. I met him in the St. Regis bar—met him and Bert Stand.

The Referee: Met whom?

Q. You met Mr. Kennedy and Bert Stand in the St. Regis bar?

A. Myself and Clarence Neal were having a drink there,

a cocktail, and I told him—this was around 5:00 o'clock—and I told him I had an appointment with Judge Aurelio for dinner; Abe Rosenthal is going to be there. In fact, [fol. 471] I invited Savarese, which is a very very dear friend of Judge Aurelio, at this dinner. "Will you join us?"

He says, "I can't. We have an executive meeting." I says, "Well, come down just for one drink anyway," which he did. And we all met about 7:00, 7:15 at the Martinique.

Q. Now, what did Mr. Kennedy say to Judge Aurelio at the Martinique?

A. Well, there was nothing I can say he said to him, but they had a little chat, and Kennedy said, "Let's not talk"—I overheard Kennedy say, "Let's not talk politics," and he shook hands and says, "Don't worry about it"—some words to that effect.

Q. Mr. Kennedy told Judge Aurelio not to worry about it?

A. Some words to that effect, yes.

Q. Did you congratulate Judge Aurelio at that time?

A. Well, I believe I made the comment, I says, "Well, it looks like you're home"—something of that sort.

Q. Did he thank you?

A. Well, yes, in a way he thanked me. Yes, sure he thanked me.

Q. How long did you remain there with Judge Aurelio?

A. About 10:30.

Q. I don't believe we got the time when you assembled at the Martinique?

A. Around 7:15, I think.

Q. So you were there from 7:15 to 10:30?

A. 10:30.

Q. With Judge Aurelio and others?

A. Right after the show; yes. We stood there for the show.

Q. Did Mr. Kennedy stay during that length of time?

A. No. Mr. Kennedy left about—after his one drink; he might have left at 7:30.

Q. He had a meeting?

A. Yes. Mr. Neal also left.

Q. He had a meeting?

A. Yes.

[fol. 472] Q. Did Mr. Rosenthal have a meeting?

A. Also left, yes.

Q. Then Mr. Rosenthal came back?

A. He came back.

Q. And stayed until 10:30, is that it?

A. Yes.

Q. Now, you have testified that you telephoned Judge Aurelio to invite him to come to the Martinique with his leader, Mr. Rosenthal?

A. Yes.

Q. Did you ever phone him at any other time?

A. I don't believe I did.

Q. When did you give him your telephone number?

A. Well, I couldn't tell you the exact date, but I gave it to him prior—I think it was prior to that I gave him my phone number.

Q. You mean prior to the Martinique?

A. Prior to that Thursday, yes.

Q. Do you recall that Judge Aurelio telephoned you on August 24th, the morning after the convention?

A. Yes.

Q. And what did he say to you?

A. Called me and thanked me. He was so elated and excited.

Q. Now, he didn't say, "I am elated and excited," did he?

A. No, no. I'm saying he was.

Q. Just tell me what you recall he said.

A. He thanked me and he told me that—he described that he was nominated the previous night, that he was nominated first, and Gavagan second, or something.

Q. Yes. Anything else?

A. And he expressed his gratitude.

Mr. Hogan: I think you said you have no objection to reading any conversation which Judge Aurelio actually had with Mr. Costello?

Mr. Sheridan: None whatsoever.

[fol. 473] Q. See if this doesn't refresh your recollection then, and isn't this the conversation which you had on August 24th:

"Judge Aurelio: Good morning, Francesco, how are you, and thanks for everything.

"Costello: Congratulations. It went over perfect. When I tell you something is in the bag, you can rest assured.

"Judge Aurelio: It was perfect. Arthur Klein did the nominating, first me, then Gavegan, then Peck. It was fine.

"Costello: That's fine.

"Judge Aurelio: The doctor called me last night to congratulate me. I'm going to see him today. He seems to me improving. He should be up and around soon, and should take the train for Hot Springs.

"Mr. Costello: That's the plan.

"Judge Aurelio: Joe Loscalzo congratulated me. That's a fellow you really should do something for. He certainly deserves something.

"Costello: Well, we all will have to get together, you, your Missus, Joe and myself, and have dinner some night real soon.

"Judge Aurelio: That would be fine, but right now I want to assure you of my loyalty for all you have done. It's undying.

"Costello: I know. I'll see you soon."

Now, you recall that conversation?

A. Mr. Hogan, I did not testify to that conversation. I conceded that it was possible, that conversation.

[fol. 474] Q. Yes. You did have the conversation?

A. But I didn't testify to that in the Grand Jury room.

Q. Does this refresh your recollection that you had this conversation, substantially?

A. Yes, I could have had it substantially.

Q. And it's substantially—

A. Yes.

Q. —true, isn't it?

A. That's right.

Q. Is there any word you want to quarrel with in the conversation?

A. No.

Q. Do you recall what time in the morning it was?

A. Well, between 8:00, 8:30.

Q. No, he refers to you—that is, Judge Aurelio refers to you as Francesco. What did you call him?

A. Tomasso.

Q. That is what, an Italian diminutive?

A. "Thomas", yes.

Q. I guess it is just Italian for "Thomas."

Mr. Sheridan: Oh, yes. He lived in New York on the East Side. It was Giovanni Giuseppi, et cetera.

The Referee: There is no Don Giovanni in this case.

Mr. Sheridan: We have a large Italian population.

The Referee: Well, we all know some things we even have them—

Mr. Sheridan: In Buffalo.

The Referee: (Continuing) —in Buffalo.

Mr. Sheridan: And Polaks. We had a fellow called Wojciechowski, and we used to call him "Watch your coat and hat." We couldn't pronounce it.

[fol. 475] Mr. Hogan: Now, I feel badly, not having made a contribution myself, so as an Irishman, I will suggest "Pasquale."

The Referee: Yes.

Q. You referred to a doctor in the conversation. What doctor is that; "The doctor called"—would that be Dr. Sarubbi?

A. It could have been Dr. Sarubbi.

Q. Well, now, Judge Aurelio said, "The doctor is to take a train for Hot Springs."

A. Oh, yes. That is Dr. Sarubbi.

Q. And you replied, "That's the plan"?

A. Definitely, yes. Definitely Dr. Sarubbi.

Q. Now, there was a reference also to Joseph Loscalzo. Do you know anybody by that name?

A. Yes.

Q. And what position does he occupy?

A. He is an Assistant District Attorney in Queens County.

Q. How long have you known him?

A. Just a short time.

Q. Well, what do you mean by a short time?

A. Well, I would say about a year—seven or eight months, or a year.

Q. How many times have you seen him in that period?

A. A few times.

Q. What do you mean by a few?

A. Well, maybe three times or so.

Q. Not more than three?

A. Maybe four times. Not too many times.

Q. You played golf with him?

A. No.

Q. Where would you meet him?

A. I met him at the Pomenok Country Club.

[fol. 476] Q. That is a golf club?

A. Yes.

Q. But you didn't play with him?

Mr. Sheridan: Does he play golf.

Q. Senator Sheridan asks if you are a golf player?

A. I'm a hole-in-one man.

The Referee: I take it the answer is in the affirmative.

Q. Did you ever try to do anything for Loscalzo?

A. No, outside of an introduction to Mike Kennedy.

Mr. Sheridan: I think, your Honor, we ought to confine the locale of this to Manhattan, rather than Queens County. Joe was in the Assembly years ago when I was up there. He is a decent fellow.

Mr. Hogan: Well, your Honor, I think it bears on the question of influence.

Mr. Sheridan: All right. Go ahead. I will withdraw the objection. You can go ahead.

Q. What was the answer?

(Answer repeated by the stenographer as recorded.)

The Referee: There is no necessary reflection upon anyone here mentioned.

Mr. Sheridan: Your Honor, but it is so extremely difficult. We are right on the eve of election.

The Referee: I realize that.

[fol. 477] Mr. Sheridan: I am extremely anxious to have my client take the stand and tell his story.

The Referee: Well, we are going to, I am sure we are going to accomplish it.

Mr. Sheridan: I would like to have it restricted, so that we can do it in the next four or five days.

The Referee: I am sure that we will.

Mr. Hogan: Now, Senator, I haven't gone far afield, and I promise you I won't, and there will be ample time—

Mr. Sheridan: I assume you are going to point out all the good and bad qualities of this man.

Mr. Hogan: I haven't pointed out anything bad so far.

Mr. Sheridan: No.

Mr. Hogan: And I don't characterize it as bad.

Q. I believe the answer to the question was, was it not, Mr. Costello, that you introduced Mr. Loscalzo to Mr. Kennedy, is that true?

A. Through a telephone.

Q. Yes. You arranged for them to meet?

A. Yes.

Q. And you talked to Mr. Loscalzo?

A. Yes.

Q. On what subject?

A. Well, he came out to visit me at this country club, he told me he has never met Mike Kennedy, which would help him—he wanted some sort of advice, political advice; he had inspirations of running for County Judge or District Attorney—I just don't remember which.

Q. And very naturally he wanted to see the leader of the Democratic Party in New York County?

A. That's right.

Q. And discuss it with him?

A. That's right. So I called up Mr. Kennedy, and I told [fol. 478] him about Joe Loscalzo, "Would you meet him and give this fellow a little advice?" He says, "Sure, gladly."

Q. And they did meet?

A. And they did meet.

Q. I think that will do for Mr. Loscalzo. Oh, I beg your pardon. That was in what month, if you can recall, that you had this?

A. I just can't recall it right now.

Q. Well, was it before the conversation with Judge Aurelio?

A. Oh, much before.

Q. In the summertime?

A. Yes, yes, golf season, because it was at the golf club where he met him.

Q. Now, do you recall receiving a telephone call from Mr. Rosenthal also on the morning following the Judicial Convention?

A. Yes, sir.

Q. And what did Mr. Rosenthal say to you?

A. He wanted to see me.

Q. And did he thank you also?

A. Yes, he thanked me.

Q. Did he see you that day?

A. Yes.

Q. Did you make arrangements over the telephone?

A. To meet me—for him to meet me at my lawyer's office.

Q. This is August 24th, the day after the convention?

A. That's right.

Q. And who was your lawyer at that time?

A. Greenbaum, Wolff & Ernst.

Q. Mr. Ernst, wasn't it?

A. Ernst, yes.

Q. Morris Ernst?

A. Morris Ernst.

Q. And you met him at Mr. Ernst's office?

A. Yes.

Q. And what conversation did you have with Mr. Rosenthal at Mr. Ernst's office?

A. No conversation in particular.. From there we went to the restaurant.

Q. Oh, I see.

A. And we had lunch.

Q. What conversation did you have at lunch?

A. Well, he was tickled and what not to think that he is [fol. 479] the leader and he sponsored him, and it was a big thing for him to put Judge Aurelio on the ticket.

Q. Yes?

A. He says, "I appreciate the efforts you put in," and I believe he spoke about getting someone a job with Judge Aurelio—either an attendant or a secretary. I didn't pay much attention to that conversation at all.

Q. Did he mention the name of the person he had in mind?

A. No, I don't believe he did. If he did, I don't recall.

Q. What did he ask you to do, Mr. Costello, with respect to this?

A. I don't even remember if he asked me to intercede. All I know, that was his idea. I think that he was trying to get me to talk to Mike Kennedy or Judge Aurelio on someone for that position. I'm not positive, but I take it for granted that that was the meaning.

Q. And what did you say?

A. I didn't give him no encouragement at all. I didn't want to butt in. We just ate our lunch, and that was the end of it.

Q. What did you say with respect to Kennedy?

A. I don't recall.

Q. This was either secretary or attendant to Judge Aurelio?

A. Something, yes.

Q. That is not as a Magistrate but as a Supreme Court Judge?

A. Supreme Court.

Q. That's clear?

A. That's right.

Q. Now, you have no—do you—withdrawn. Did he ask you to seek Mr. Kennedy's approval?

A. Well, words to that effect, he might have. I didn't pay much attention to him. I wasn't interested to hear it, frankly speaking.

Q. Well, what did you say to him?

A. I don't remember what I said to him.

[fol. 480] Q. Well, now, I show you your Grand Jury testimony on page 432 where I marked it there (indicating).

A. Yes. I might have said that.

Q. That refreshes your recollection?

A. I might have said, if Kennedy approves it, it's all right with me, or something.

Q. If Kennedy approves, it's all right with you?

A. Yes.

Mr. Hogan: Your Honor, at this point I go to a new subject, and if it meets with your approval, and Senator Sheridan has no objection, I would like to discontinue at this time?

The Referee: We will take a recess until 2:00 o'clock.

(A recess was taken to 2:00 o'clock P. M.)

AFTERNOON SESSION.

The Referee: In respect to the hours, Mr. District Attorney and Senator, I suppose that you don't want to sit very late in the afternoon, if other things are equal?

Mr. Sheridan: Whatever you wish.

The Referee: Half past four?

Mr. Sheridan: Fine.

Mr. Hogan: That will be fine.

The Referee: Or until there is a break in the testimony within a few minutes after that.

Mr. Sheridan: And at about 3:30, if we are getting tired, we will take that five minute recess?

The Referee: Yes, that is all right.

[fol. 481] FRANK COSTELLO, a witness for the Petitioner, resumed the stand.

Direct examination.

By Mr. Hogan (Continued):

Q. Mr. Costello, you told us at the outset that you were in the slot machine business?

A. Well, vending machines.

Q. Yes.

A. Vending.

Q. Commonly called slot machine?

A. Slot machine.

Q. Did you operate in New York City at one time?

A. Yes, sir.

Q. When?

A. Well, on and off since 1928, I believe.

Q. 1928, until when?

A. On and off until about the latter part—the first part of 1934.

Q. 1928 to 1934. And under what name did you operate?

A. Midtown.

Q. Midtown what?

A. Mint Company.

Q. Wasn't it Midtown Novelty Company?

A. Well, mint and novelty, I just forget.

Q. Any other name?

A. True Mint.

Q. The True Mint Corporation?

A. That is right.

Q. And what relationship did the True Mint Corporation have to the Midtown Novelty Company?

A. Well, it was one, it was just a branch.

Q. Wasn't the True Mint the parent corporation?

A. The parent corporation, yes, sir.

Q. And the Midtown indicated that that company was—

A. Sort of a service station.

Q. And had that territory?

A. Yes.

Q. And who was interested in this business other than yourself; who was associated with you?

A. Philip Kastel.

Q. He is still associated with you, is he not?

A. Yes, sir.

[fol. 482] Q. Where was your office?

A. 1860 Broadway.

Q. What space did you have there?

A. I believe we had a few rooms, three or four rooms on the eleventh floor.

Q. Did you have any storage space also?

A. One or two rooms in the basement of the building.

Q. How many collectors did you employ?

Mr. Sheridan: Your Honor, I submit, does this refer back to 1934, nine years ago?

The Referee: It seems to.

Mr. Hogan: It is between 1928 and 1934, yes.

Mr. Sheridan: If it does, then I submit as to extensive examination as to the business conducted at that time the Court would almost take judicial notice of the Statute of Limitations. We are not held to a knowledge of that, nine years ago.

Mr. Hogan: Your Honor, I intend to go back to 1915 to show the type of man whose aid and influence—

Mr. Sheridan: That may be all right.

Mr. Hogan: —was sought and obtained.

Mr. Sheridan: Mr. Hogan, I don't think I have made the point of my objection clear. If we are going into details as to how he conducted his business, and where he had it and all of that, back in 1934, a period of nine years, I say it is an unfair presentation.

The Referee: Well, I supposed this is going to be connected up with the defendant?

Mr. Hogan: Yes, sir.

Mr. Sheridan: This man might have met him five times in his life, all within a period of a year.

[fol. 483] Mr. Hogan: This is connected with, I think it is paragraph sixth of the petition, your Honor, in which we set out a description of the activities of the witness, and his background. It is part of the proof, I submit.

The Referee: Paragraph which is it?

Mr. Hogan: Paragraph sixth, your Honor.

The Referee: Well, of course, I am in doubt as to how you expect to connect this up with the respondent.

Mr. Hogan: I think, your Honor, we have already demonstrated that the respondent and the witness were associated in the last six months. We have shown—

The Referee: You have shown the meetings, yes.

Mr. Hogan: Yes.

Mr. Sheridan: On five different occasions.

Mr. Hogan: Correct.

The Referee: How are you going to show any knowledge of such bad character on the part of the respondent? I suppose you expect to prove that in some circumstantial way.

Mr. Hogan: Exactly. I think facts will be adduced which will warrant the inference that the respondent had knowledge of this bad character, and we hope by questioning to adduce facts which will illustrate that character.

The Referee: Well now, I will receive this for the [fol. 484] time being, subject to a later motion to strike it out.

Mr. Hogan: Thank you.

The Referee: We will see how it develops. You cannot decide these things all at once.

Mr. Sheridan: No.

Mr. Hogan: Was the question answered, Mr. Stenographer?

Q. (Pending question was, "How many collectors did you employ?")

A. I don't recollect.

Q. Well, would you have any idea as to the number?

A. Well, I would say eight or ten were relatives of mine, and there might have been probably ten or twelve more; that would make around twenty.

Q. Did you have stores other than your office at 1860 Broadway?

A. We had one more branch in 27th Street.

Q. Didn't you have a branch on 116th Street also?

A. Well, I believe that is the True Mint.

Q. I see. Well then, there were three offices?

A. Three.

Q. And what were these stores used for?

A. Well, it was sort of a repair shop, and got night calls and day calls.

Q. How many machines were in operation?

A. Well, there might have been 500, 550 machines.

Q. Now did you furnish bail for those persons who were arrested?

A. Yes.

Q. Did you furnish lawyers?

A. Yes.

Q. Did you pay the fines assessed?

A. Yes.

Q. Did the storekeepers have the telephone number of the True Mint?

A. Yes.

[fol. 485] Q. Where was that, how did they get that?

A. Well, it was right on the machine.

Q. I see. Now did you have any private office at 1860 Broadway, in addition to the office of the Midtown?

A. Yes, I had an office.

Q. And on what floor was that?

A. I believe the tenth floor.

Q. And what did you use that office for?

A. Well, it was my own private office. At the time I was gambling.

Q. Yes. You used it for gambling?

A. Well, not used it for gambling, but to meet certain people that I had to pay off or collect.

Q. Was that the only use to which it was put?

A. That is the only use.

Q. Did you take bets there?

A. No, I never took bets.

Q. But you met people with whom you were gambling?

A. I gambled myself.

Q. Where did you have these slot machines; were they confined to Manhattan?

A. Well, at the time there probably were 7,000 or 8,000 slot machines throughout the five Boroughs, and I just had them separated, some in Nassau County and Manhattan, and a few in the Bronx.

Q. Your territory was not restricted?

A. No, I had 500 probably of the 7,000 or 8,000.

Q. Do you recall that there was a police raid in February of 1934?

A. Yes.

Q. How many of your machines were taken at that time?

A. Oh, I couldn't—I don't recall.

Q. Did you operate after that raid?

A. No, no.

Q. I show you a series of checks, 18 checks issued between the dates July 23rd, 1934 and October 25th, 1934. [fol. 486] You will note that they are made payable to your order.

A. What date? Will you repeat that question?

Q. July 23rd, 1934 and October 25th, 1934.

A. Yes.

Q. That was after you stopped the slot machine business?

A. Yes, that is right.

Q. And they are made payable to your order, are they not?

A. Yes.

Q. And they total about how much?

A. I don't know.

Q. Well, do you want to look through there? I think I have added them up, and they amount to \$40,000 but suppose you check it.

A. Well, I will have to—I will need pencil and paper. You have got 18 checks here.

Q. (Indicating) That is \$3,000, isn't it; \$6,000?

A. \$6,000.

Q. \$12,000?

A. \$12,000.

Q. \$13,000?

The Referee: Here is a pencil.

Mr. Hogan: I think we can do it.

Q. (Continued) \$14,500, \$20,500, \$21,500, \$24,000, \$26,000, \$27,500, \$28,500, \$29,000, \$30,000—

A. \$31,400.

Q. Yes. \$33,000, \$35,000, \$36,000, and four would be about \$40,000?

A. Yes.

Q. And where did that money come from?

A. These checks, Mr. Hogan, were accommodating—I was accommodated by Mr. Philip Kastel. I had no bank account.

Q. Yes.

A. And I was gambling at the time, and I used them as pay-offs. In other words, if I owed a certain individual \$2,000 or \$3,000 or \$500 and did not give him cash, I would give Mr. Kastel \$500 or \$1,500 and say, "Let me have a check," and he would deposit it and give me a check for it.

[fol. 487] Q. And then these checks would go to gamblers?

A. To individuals.

Q. Is that right?

A. Yes, that is right.

Q. And the endorsements on the reverse side of these checks are for the most part of bookmakers?

A. That is right.

Q. Well, after 1934 when did you next operate slot machines?

A. In Louisiana.

Q. And how did that come about? I will withdraw that question. When was it?

A. The early part of 1935.

Q. And what was the name of the company?

A. The Pelican.

Q. Pelican Novelty Company also?

A. Yes.

Q. Well, who asked you to operate in New Orleans, in Louisiana?

Mr. Sheridan: Now as I understand it, this slot machine or vending machine is legal, the same as Pari-Mutuel betting at the race tracks in New York, that is legal. Do we have to go into that inquiry?

The Referee: I am sure I don't know. I haven't any knowledge on the subject.

Mr. Hogan: I am bringing out the background of the witness, and if there is good in the background as well as bad, I would like to bring it out. If this can be construed as good, fine.

Mr. Sheridan: You don't intend that as good, do you, Mr. Hogan? A slot machine in New York is still legal.

Mr. Hogan: I am here to—

[fol. 488] The Referee: Just let Mr. Sheridan speak.

Mr. Hogan: I am sorry.

Mr. Sheridan: I understand, your Honor, that in the State of Louisiana this form of practice is legal, the same as Pari-Mutuel betting at our race tracks is legal. In the State of New York, as your Honor will take judicial notice, the State receives an income of about \$10,000,000 a year, and no matter what some people may think of race tracks and betting, it is legal in New

York at the tracks. These machines, vending machines, are legal in Louisiana. The point of my inquiry is, he has not practiced that in New York State, in this community, where people would be apt to know the nature and character of this business. We cannot be held to a strict accountability for anything this man may have done down in Louisiana. This respondent was a Magistrate in this City, he was an Assistant District Attorney.

The Referee: Certainly. I think that is largely so, but you are not going to devote any time to this, Mr. Hogan?

Mr. Hogan: I think we can cover it in short order, your Honor, and we offer it for what it is worth, to indicate what business this witness has been in.

The Referee: Well, he has now said that he operated the Pelican Corporation.

Mr. Hogan: The Pelican Novelty Company in 1935.

The Referee: In Louisiana in 1935.

[fol. 489] Q. And how did that come about?

Mr. Sheridan: I think that is incompetent, irrelevant and immaterial.

Mr. Hogan: I will withdraw it.

Q. Who was interested with you in the Pelican Novelty Company?

Mr. Sheridan: That is objected to. We are held to account for this man in and about New York. If there was any blackleg or good man or bad man in Louisiana, we have nothing to do with him.

The Referee: You are not going to show that it was anyone connected with the various matters which we have been hearing about this morning, are you?

Mr. Hogan: Your Honor, the answer is no. It is an associate of this witness, and I think his associates are very definitely matter of proof here.

The Referee: I will take the answer to this question.

Q. Who was associated with you in the Pelican Novelty Company?

A. Philip Kastel.

The Referee: That has already been shown, that he was associated with him in other business.

Q. Yes. You started in 1935. What were your profits in that year?

Mr. Sheridan: Now I think—all right, I will withdraw it.

[fol. 490] The Referee: Oh, I don't think we can go into that.

Mr. Sheridan: Go ahead, I will withdraw that objection.

The Referee: All right, the objection is withdrawn.

Mr. Sheridan: Surely.

The Referee: You may ask it. What were your profits that year?

The Witness: Right offhand, I would say \$60,000 or \$70,000.

Q. And in 1936 the same?

A. About the same, I would say.

Q. And how long did you continue operating the Pelican Novelty Company?

A. I think the early part of 1938 or the later part of 1937.

Q. Yes. What was your initial investment, by the way, Mr. Costello?

A. About \$15,000 or so, or \$20,000; I don't remember.

Q. You stopped operating in 1938?

A. The latter part of 1937 or early 1938.

Q. And did you resume after that, after 1938?

A. No.

Q. Well, aren't you in that business at the present time?

A. Yes.

Q. Well, when did you start up again?

A. The first of the year 1943.

Q. You were not in it in 1942?

A. No.

Q. Now will you explain how these machines are geared?

Mr. Sheridan: That may be very interesting from a scientific standpoint, but I don't think my client, a [fol. 491] little Magistrate in New York, is interested in how these things are geared.

Mr. Hogan: I don't think, your Honor, that—

The Referee: Are you going to show any knowledge on the part of Mr. Aurelio?

Mr. Hogan: I don't think, your Honor, that that is important here. We are interested—

The Referee: Do you want to show that these machines are operated in violation of law?

Mr. Hogan: No, I am simply going to show the type of the business this witness is in, and I think it is important to show.

The Referee: You have pretty well done that now, haven't you?

Mr. Hogan: Yes, but this, in my opinion, is an important fact in describing the type of business that it is; because when—

The Referee: Are you going to show the adjustability of these machines as to the amount of profits, or something of that sort?

Mr. Hogan: That is right.

Mr. Sheridan: I submit, your Honor, that we are not to be held accountable for that.

The Referee: No, you of course are not to be held to a knowledge of any such thing particularly, but on the general type of the business that the man was in, I think I will take it.

Q. Will you describe how the machines are geared, then, Mr. Costello?

A. Just what do you mean by geared, Mr. Hogan?

Q. Well, supposing a million dollars is put into the machines—

A. You mean what sort of a percentage we operate on? [fol. 492] Q. That is right, yes.

A. Well, I am not a mechanic, I am not an expert at it, but I would judge, through hearsay, about 18 per cent, 20 per cent.

Q. So that if a million dollars is played, the operators are bound to get \$200,000 back?

A. That is right.

Q. You cannot lose, can you?

A. That is right. No, no more than a mutuel track can lose, where they get 15 per cent.

Q. Is Seymour Weiss connected with this business?

A. No.

Q. Is he a friend of yours?

A. Yes.

Q. Has he been convicted of crime?

A. Yes.

Mr. Sheridan: If your Honor please, Seymour Weiss is a friend of Huey Long's down in New Orleans, and that happened to be brought in. Confine us to New York, any of these local politicians, but don't bring in Mr. Seymour Weiss.

The Referee: Aren't we going a long way from the seat of the inquiry here?

Mr. Hogan: Your Honor, you will observe that paragraph sixth sets out a number of things, among which are that Costello is an associate of well known gangsters, and other notorious gangsters and gunmen. Now I submit that I have a right to show that this witness does associate with criminals.

The Referee: Well, not as bearing upon his credibility. This is bearing on his character.

Mr. Hogan: No, to show the character of the witness, who had this influence.

The Referee: It is pretty remote, Mr. District Attorney. You have alleged certain people here.

Mr. Hogan: Yes, and I will reach them, too.

[fol. 493] The Referee: This man is not in any way mentioned here, is he?

Mr. Hogan: No, he is not. It says "and others", your Honor.

The Referee: "And other notorious gangsters and gunmen." Well, you would not propose to show that Mr. Weiss was a gunman, would you? You would not want to go into that?

Mr. Hogan: No, but he has a criminal record and is a friend of the witness.

Mr. Sheridan: And was a friend of a lot of men who were prominent in Louisiana.

Mr. Hogan: Surely.

The Referee: It is pretty remote. However, you may show that this man was a friend of Mr. Weiss, for what it is worth.

Q. What part do you play in this slot machine business? Do you go there at all?

Mr. Sheridan: Mr. Hogan, the eyes of the public are watching. Go on and ask about Mr. Weiss.

Mr. Hogan: No, I think that has been answered, Senator.

Mr. Sheridan: All right.

Q. Do you go to New Orleans?

The Witness: Did I answer the Mr. Weiss question, Mr. Hogan?

Mr. Hogan: I think you did. Well, if you did not, answer it now.

A. Yes, I know Mr. Weiss. He is the owner of the largest hotel in the south, the Roosevelt Hotel.

[fol. 494] Q. Has he been convicted of crime?

A. Convicted of a crime, yes.

Mr. Hogan: All right.

Mr. Sheridan: Would you mind asking him one question further?

Q. Do you know what crime?

A. Mail fraud, or something, I just don't know.

Q. Do you go to New Orleans to supervise the business?

A. Well, I go there on consultations.

Q. But Kastel really supervises it?

A. Yes.

Q. And Kastel had been convicted of crime, has he not?

A. Yes.

Q. I show you a picture and ask you if that is your business associate, Mr. Kastel (showing witness photograph)?

A. Yes, sir.

Mr. Hogan: I offer it in evidence.

Mr. Sheridan: I object to that.

The Referee: Let me look at the picture.

Mr. Sheridan: There is nothing in the record to show that Judge Aurelio knows Mr. Kastel.

Mr. Hogan: I submit, if your Honor please—

The Referee: I will withhold my ruling on that photograph, and see what more develops. We have it in that Mr. Kastel is an associate, a business associate over many years, of this witness, and that he has been convicted of crime. I don't think the photograph has anything, so I will not admit it at present. You may offer it later.

Mr. Hogan: All right.

[fol. 495] Q. Do you know what crime?

Mr. Sheridan: I object to that as not binding on my client unless they can show that he consorted with him, had knowledge of him.

The Referee: Are you going to show any relationship?

Mr. Hogan: No, but your Honor—

Mr. Sheridan: That is the question.

The Referee: I know the other point. It has bearing on this man.

Mr. Hogan: Definitely on this man, who has the influence, who was aiding this respondent, and to whom the respondent pledged his undying loyalty.

The Referee: I will let you show what the crime was of which Mr. Kastel was convicted.

Q. Do you know what crime he was convicted of?

A. I believe it was mail fraud.

Q. Now did you engage in any activity other than slot machines from 1931 to date?

A. From 1931 to date?

Q. Yes, in any other occupation? Well, haven't you referred to yourself as a commission broker?

A. Yes.

Q. What do you mean by that?

A. Well, down at the race track I have friends; they give me bets and I lay it off for them and get a percentage.

Q. Lay it off with whom?

A. Well, with certain bookmakers, or the machines.

Q. What?

A. Certain bookmakers.

Q. What bookmakers?

A. Well, we will say, if I have to answer the question, Owney Madden.

Q. Yes.

A. Sherman.

[fol. 496] Q. Frank Ericson?

A. Frank Ericson.

Q. What percentage do you get?

A. Five per cent.

Q. You know Frank Ericson very well, don't you?

A. Yes.

Q. Play golf with him?

A. Yes.

Q. He is a bookmaker?

A. Well, he was.

Q. Isn't he at the present time?

A. Not to my knowledge at the present time.

Q. Do you have an interest in his book?

A. No, sir.

Q. And you bet yourself on the races?

A. Bet myself. I was never a bookmaker in my life, just bet myself.

Q. Bet heavily?

A. Well, if you call it heavy, yes, at times, yes.

Q. As much as \$500 or \$1,000 a race?

A. I did that.

Q. Now were you in any other business since 1931, other than what you have described? Specifically, do you have any interest in a liquor distributing company?

A. No, sir.

Q. Do you own any interest in a distillery?

A. No, sir.

Q. You have no interest or ownership in any liquor distillery or company or agency?

A. No, sir.

Q. Did Judge Aurelio ever ask you if you were in the liquor business?

A. No, sir.

Q. And you never told him that you were?

A. No, sir.

Q. Or any branch of it?

A. No, sir.

Q. Did you ever tell Judge Aurelio that you were having trouble getting stuff over here?

A. No, sir.

Q. Did you ever tell Judge Aurelio that you were having difficulty getting hops in your liquor business?

A. No, sir.

Q. Did you ever keep it a secret that you were in the [fol. 497] slot machine business?

A. No, sir, it is perfectly legitimate.

Q. You have seen reference to it in the papers, haven't you?

A. Yes.

Q. You have seen references to yourself as King of the slot machines?

A. That is right; illegitimate in New York and legitimate in Louisiana, where I am operating.

Q. Do you have any other gambling interests recently?

A. In 1942.

Q. What was that?

A. Up in Saratoga. I had an interest in a Casino, a gambling casino.

Q. What was it called?

A. Piping Rock.

Q. Piping Rock Casino at Saratoga Springs?

A. That is right.

Q. And who were your partners in that gambling casino?

A. Well, to my knowledge there was a Jack Lansky.

Q. Is he related to Meyer Lansky?

A. I believe he is a brother.

Q. Yes.

A. Joe Adonis.

Q. Joe Adonis, from Brooklyn?

A. That is right.

Q. Anybody else?

A. And the one man that I did business with.

Q. Who is he?

A. I would like to tell the story my way, Mr. Hogan, if you don't object.

Q. I haven't any objection.

A. There is a Joe Stein which is a friend of mine, I have known him for years, which I consider very honorable. He came to me and gave me this proposition, that he had a lease on a Casino in Saratoga called the Piping Rock, would I undertake running it? I told him I was not interested, didn't have no time for it. A few days later he came to me and he [fol. 498] says, well, he had some people interested, he says, now, but they won't take 100 per cent of it. I says, "What have you got left?" He says thirty. I said, "Well, I will take the thirty per cent under one condition; I will finance my thirty per cent, but you will have to look after my interests, because I will probably never be up there." Being I trust the man, I gave him the money, and I have a thirty per cent interest.

Q. What were your profits for the season?

A. Oh, I would say from \$9,500 to \$10,500, I just don't recollect.

Q. Nine or ten thousand?

A. Yes.

Q. How long have you known Joe Adonis?

A. I know him around town for probably ten years.

Q. Do you know him as Adonis or Doto?

A. No, I know him as Adonis.

Q. Isn't his correct name Joseph Doto?

A. Well, I know him as Adonis.

Q. And where do you see him?

A. I see him at the race track, at a fight club, I mean in Madison Square Garden, or in a restaurant, cocktail bar. I see him around town, the way I see thousands of others.

Q. You have read about him in the newspapers, haven't you.

Mr. Sheridan: I object to it, your Honor, as no proof. If we are going to go into the shortcomings of each and every one of these men it will be definitely a smear.

The Referee: I don't believe we are.

Mr. Sheridan: Well, I hope not.

The Referee: They have alleged this particular man. [fol. 499] Mr. Sheridan: Yes, but I mean whatever Adonis did, Adonis may be the worst type, he may be the male Magdalene, he may be everything; I don't know.

Mr. Hogan: All I am contending, your Honor, is that this man associates with these people, and that I think is illustrative of his character.

Mr. Sheridan: All right, but to go into each and every man, his shortcomings, what he did and all of that—

Mr. Hogan: No, I am not going into—

The Referee: I don't think the District Attorney will take very long on this.

Mr. Hogan: No, I have a few questions. If the man admits he knew him and knows him well, then I think I am entitled to ask if he has a criminal record, and that is all. I am not going into the details of the criminal record, or anything else.

Q. You have read about him; haven't you?

A. Well, not as a criminal.

Q. Did you ever read of him as leader of the Brooklyn underworld?

Mr. Sheridan: Now you see, that is an unfair question.

Q. Did you or didn't you?

Mr. Sheridan: Now wait. Your Honor; I submit that is an unfair question.

The Referee: It doesn't make him so, but it does bear, if he was an associate of this man, and if he had that reputation.

[fol. 500] Mr. Sheridan: But to say that he was leader of the underworld, how can we meet proof of that kind?

The Referee: Of course, that is rather a large order.

Mr. Sheridan: That is a large order for any man.

The Referee: To be leader of the underworld for any City.

Mr. Hogan: I will withdraw it, your Honor.

Q. Going back a few years, did you know Arnold Rothstein?

A. Yes.

Mr. Sheridan: Now, your Honor, Arnold Rothstein was killed about 15 years ago, I think, when Joe Banton was District Attorney of New York, in 1928.

Mr. Hogan: This man was very close to Arnold Rothstein. I have a right to show that that was his association at that time.

The Referee: I will allow you to show in a general way that these men were associates of the witness.

Q. Now isn't it true that you were very close to Arnold Rothstein?

A. Yes.

Q. What was his business?

A. He owned a hotel, the Fairfield Hotel on 72nd Street, and the Rothmore Realty Company.

Q. Didn't you know him as a professional gambler?

A. And he gambled also.

Q. You had dealings with him, did you not?

A. Yes.

Q. You loaned him money?

A. To the extent—

[fol. 501] Mr. Sheridan: Your Honor, how can we meet all of this, as to whether he loaned money to a man who is dead fifteen years ago?

The Referee: Well, the District Attorney is attempting to show that this witness is a man of notorious character, and he is trying to show it out of his own mouth. Now if that reputation is notorious enough, I suppose that it might have some bearing on the knowledge that the respondent had. That is the general basis.

Mr. Hogan: That is the theory, your Honor, yes.

The Referee: Well, I will let him show it for what it is worth. We will see about it later.

Q. Did you loan him money?

A. Yes.

Q. Large sums?

A. Yes.

Q. What was your business at the time; where did you get the money?

A. I believe it was in 1928, I loaned that money, and I just stated my business.

Q. What was your business?

A. In the vending machine. True Mint Vend. I had at the time.

Q. Did you loan him money earlier than 1928?

A. Not to my recollection.

Q. What was your business in 1925?

A. 1925?

Q. Yes.

A. In 1925 I believe I was in the real estate business.

Q. You say that you got the money you loaned Arnold Rothstein from the slot machine business, is that right?

A. I didn't say where I got it from. You asked me—

Q. Where did you get it?

A. Well, I just don't remember. I might have had it for ten years, I don't know.

Q. Well, let me show you your Grand Jury testimony on that, at page 586 (showing witness volume)?

A. Yes.

[fol. 502] Q. Now where did you get it?

A. My testimony is there. I might have had it from a little bootlegging.

Q. You were in the bootlegging business, weren't you?

A. I was.

Q. You smuggled whiskey into the country, didn't you?

A. Yes.

Q. Where was your office?

A. 405 Lexington Avenue.

Q. Did you own trucks?

A. I believe we owned some trucks.

Q. Chartered boats?

A. Yes.

Q. And your income was pretty heavy in those years, wasn't it?

A. Well, it was profitable.

Q. Did you ever pay any State Income Tax in those years?

A. No, but I have paid it later.

Q. Well, when did you pay it?

A. Mr. Hogan, I think you have the record when I made my settlement, for all the back years.

Q. I will be glad to show it to you. I show you a copy of a letter written by an accounting firm to George M. Levy. Mr. Levy was your attorney at the time?

A. Yes, sir.

Q. And I ask if that refreshes your recollection as to the years?

A. From 1919 to 1932.

Q. Yes; you paid no State Tax from 1919 to 1932, is that right?

A. That is right, and paid them all in 1932.

Q. And what did it amount to? What is the total amount on which you paid tax (showing witness paper)?

A. Is this the total, 305, is that it? \$305,000.

Q. Did you pay any Federal Tax for those years?

[fol. 503] A. No, but I also made a settlement with the Federal Government.

Q. When did you make the settlement with the Federal Government?

A. In 1932.

Q. So that from 1919 to 1932 you made no tax payment to the Federal Government or to the State Government?

A. That is right.

Q. And you were in the bootlegging business in those years?

A. Yes.

Q. Were you associated with Bill Dwyer at that time?

A. No, sir.

Q. You know him?

A. Yes.

Q. You know he was convicted of bootlegging?

A. Yes.

Q. A friend of yours?

A. Well, to a certain extent, yes.

Mr. Sheridan: Your Honor, he says he did not associate with him or he did not have any business relations.

The Referee: I think he claims he did not have any business relation with him.

Mr. Sheridan: And I think the Court will take judicial notice that men engaged in the bootleg business did not make that one of notoriety, that they were secretive, that they were furtive, and they concealed their activities.

The Referee: That was so in many cases, of course.

Mr. Sheridan: Surely. I mean on the question of how anybody would find it out, I suppose that was the job of the Federal Government and the local District Attorney. They didn't charter boats in their own name, and they didn't advertise to the world at large, [fol. 504] that they were in the business, so we cannot be held accountable for that.

Mr. Hogan: That is argument, your Honor. I don't know how they operated; I am sure, but the fact remains that men were in the business, isn't that so, and it was illegal.

The Referee: I will let it stand for what it is worth. Merely knowing a person I don't think amounts to much, if anything.

Mr. Hogan: No. I think in most cases, your Honor, we will find that he associated with them.

The Referee: You have got to do more than that. You have got to have something more than association with malefactors.

Mr. Hogan: I agree with you.

Q. You were convicted in 1915?

A. Yes, sir.

Q. What was the charge?

A. The Sullivan Law.

Q. A gun charge?

A. Yes, sir.

Q. Were you sentenced to jail?

A. Yes, sir.

Q. How long did you remain in jail?

A. Ten months.

Q. That would be 1916?

A. Yes.

Q. How old were you at the time?

A. Nineteen or twenty years old.

Q. Nineteen or twenty. Since that time, 1916, have you done any work other than gambling, bootlegging and slot machines?

A. Yes.

Q. Well, suppose you tell us the work you have done in those 27 years?

The Referee: That was not a felony at that time, was it?

[fol. 505] Mr. Sheridan: A misdemeanor charge.

The Witness: A misdemeanor.

The Referee: It was a misdemeanor charge.

Mr. Sheridan: Possession.

The Referee: I did not hear. There is no question it was a misdemeanor charge?

Mr. Hogan: No question, your Honor.

Q. You were going to say that you had done some work between 1916 and 1943 other than gambling, bootlegging and slot machines?

A. Yes.

Q. What?

A. Well, I was associated with Harry Horowitz Novelty Company.

Q. What work did you do with the Novelty Company of Harry Horowitz?

A. It was a Novelty Company, sold fountain pens, fountain pencils—or pens, rather, and Kewpie dolls and razor blades.

Q. Yes.

A. Safety razors, and I worked in there. I packed, sold, acted as sort of a salesman.

Q. When was this?

A. Well, I would say from 1917 or 1918 until about 1920.

Q. Didn't you have a financial interest in this company?

A. Yes.

Q. How much?

A. I was associated; I had an interest in the company.

Q. How much money did you put into it?

A. Oh, I don't know; maybe \$400 or so.

Q. Is that all?

A. A small amount, yes.

Q. Well, weren't you in the liquor business at this time, the bootlegging business at this time?

A. No.

[fol. 506] Q. Well, where did you get this money that you put in there?

Mr. Sheridan: You mean this \$400?

Mr. Hogan: Whatever it was.

A. I probably borrowed it. I don't know if I had it. You are going back thirty years. I can't just remember where I got it.

Q. Don't you remember this question being asked and giving this answer:

"Q. And that money was obtained from bootlegging?

A. From gambling or bootlegging."

A. In the Horowitz?

Q. The question just before that is, "Q. That is the same Horowitz that was in the Dainties Company?" And the question before that is, "Now you were telling us about another company that you had an interest in, that made dolls, of some kind?"

A. Yes, that is that Horowitz.

Q. That is the same Horowitz that was in the Dainties Company?

A. Yes.

Q. How much money did you put in there?

A. I put some money in there, and I lost it.

Q. And that money was obtained from bootlegging?

A. From gambling or bootlegging.

Q. Gambling or bootlegging?

A. Yes."

Now did you give those answers before the Grand Jury?

A. Now just a second, Mr. Hogan. I might have misunderstood the questions, for the simple reason that we did not have prohibition until 1919, so I could not have got it in 1917 or 1918 in bootlegging.

Q. We had gambling—

A. (Interposing). I might have misunderstood the question.

[fol. 507] Q. We had gambling in 1917, didn't we?

A. I didn't get it in gambling.

Q. Then your testimony at the present time is that you did not get the money from gambling or bootlegging, is that true?

A. That is right.

Q. But you did have a financial interest there?

A. Yes.

Q. And did you do any work?

A. Yes.

Q. Now did you do any other work from 1916 to 1943?

A. Yes.

Q. Where?

A. Well, I was in business, I had the Koslor Realty Company.

Q. When was that?

A. I have no records here now; probably from 1922 to 1925.

Q. What did you do in that business?

A. Real estate.

Q. Weren't you in the bootlegging business in those years?

A. Yes; I did both.

Q. Did you sell any houses or lease any apartments?

A. Yes.

Q. How many transactions would you say you had?

A. Well, right offhand I can say that we had one transaction on 92nd Street and West End Avenue, and up in the Bronx we built some homes there; that is, five-story walk-ups; I had one or two big apartment houses.

Q. Where did you get the money to build those houses?

A. Well, I might have got that through bootlegging or gambling.

Q. All right. Now can you tell of anything else you have done in the last 27 years?

A. Then I was the president of the Babylon Waterfront Corporation.

Q. What money did you invest in that?

A. \$25,000 or \$30,000.

[fol. 508] Q. And where did you get that?

A. From the same source.

Q. Now how about the Dainties Products Co., early in the twenties; how much did you put into that?

A. About \$15,000 or \$20,000.

Q. And you got that from bootlegging and gambling also?

A. Either gambling or bootlegging.

Q. Do you have a bank account?

A. Mrs. Costello has one. I do my transactions through Mrs. Costello's bank account.

Q. You don't have one personally?

A. No.

Q. Now have you a friend, Willie Maretti, also known as Willie Moore?

A. Yes.

Q. How long have you known him?

A. 25 years or so, maybe more.

Q. You are very close to him, aren't you?

A. Yes.

Q. Very friendly?

A. Well, I know—yes, I am very friendly.

Q. See him often?

A. Very often.

Q. Do you know whether he has been convicted of crime?

A. Yes, he has been.

Q. I show you a picture. Is that a picture of Willie Moore (showing witness photograph)?

A. Yes, sir.

Mr. Hogan: I offer it in evidence, your Honor.

Mr. Sheridan: Same objection.

The Referee: Let me see it (examining picture). I will not receive it for the present. Mark it for identification.

(Photograph marked Petitioner's Exhibit 2 for identification.)

[fol. 509] Q. You call him at Hasbrouck Heights and Deal?

A. Yes, sir.

Q. And California, where he has been recently?

A. Yes, sir.

Q. And you see him in Hot Springs?

A. I believe just once in Hot Springs.

Q. Do you know what crime he was convicted of?

A. Right now I couldn't tell you.

Q. Wasn't he convicted of—

Mr. Sheridan: Mr. Hogan, are you testifying?

Mr. Hogan: Withdrawn. If you don't want it, all right.

Q. Do you know Ben Siegel, also known as Bugs Siegel?

A. Just an acquaintance.

Q. Well, how long do you know him?

A. Oh, I have seen him around for the past ten or twelve years.

Q. And isn't he associated with Meyer Lansky?

A. Not to my knowledge.

Q. You never heard Siegel and Lansky referred to as Bugs Meyer?

A. I read that in the newspapers, yes.

Q. How long do you know Lansky?

A. About the same time.

Q. Ten years?

A. About the same time as—

Q. And you see him often?

A. Yes.

Q. Where?

A. Well, I see him around restaurants, sporting events.

Q. Now do you know Abe Zwillman, known as Longey Zwillman, from Newark?

A. Slightly.

Q. How long have you known him?

A. Oh, seven or eight years.

Q. Yes. You see him in Hot Springs, don't you?

A. I believe I seen him once in Hot Springs.

[fol. 510] Q. Didn't he telephone you in Hot Springs?

A. Telephoning me is not seeing him there, Mr. Hogan.

Q. But in addition to seeing him, you testified you saw him once, didn't you?

A. Do you want me to answer the question if I seen him, first?

Q. I think you answered that you saw him once?

A. Once.

Q. Did he telephone you also at Hot Springs?

A. Not to my recollection.

Q. Did you seen him in New York?

A. Yes.

Q. You say you only know him slightly?

A. Well, he is an acquaintance, a very good acquaintance of mine.

Q. Well, I read you this question and answer from your Grand Jury testimony:

"Q. And you of course know Zwillman very well, don't you?

A. Yes."

Now was that the truth?

A. Well, if you call it well.

Q. No, I said very well, and you said, "Yes."

A. Well now, I would like to define the question of "Well," Mr. Hogan.

The Referee: He is asking you, you used the words yourself, as I understand it.

Mr. Hogan: No, he responded in the affirmative to my choice of words.

The Referee: Oh, he responded.

The Witness: Well, I would call it well. All right.

Q. Now you know Zwillman has been convicted of crime, don't you?

A. No.

[fol. 511] Q. Never heard that?

A. No.

Q. I show you a picture; is that a picture of Zwillman (showing witness photograph)?

A. That is his picture.

Mr. Hogan: Mark it for identification.

(Photograph marked Petitioner's Exhibit 3 for identification.)

Q. Do you know Longey Zwillman's associate, Jerry Catena?

A. Yes.

Q. How long do you know him?

A. Oh, I would say about three years, three or four years.

Q. Play golf with him, don't you?

A. Yes.

Q. Do you see him from time to time?

A. I play golf with him.

Q. And you see him in addition to that, don't you?

A. Well, yes.

Q. You know he has a criminal record?

A. Yes, I knew he had been convicted.

Q. Do you know what crime he was convicted of?

A. No.

Q. I show you a picture; can you identify it (showing witness photograph)?

A. Yes, sir.

Q. Who is that?

A. Jerry Catena.

Mr. Hogan: Kindly mark it for identification.

(The photograph was marked Petitioner's Exhibit 4 for identification.)

Q. Is he also known as Jerry Catena?

A. I only know him by Jerry.

[fol. 512] Q. That is the picture of the Jerry Catena you know?

A. Yes, that is the Jerry.

Q. Do you know Little Augie Persona, from Brooklyn?

A. Yes.

Q. How long have you known him?

A. About ten or twelve years.

Q. Do you see him at the Madison Hotel?

A. I see him at the Madison, I see him at the race track.

Q. What is his business?

A. I couldn't tell you.

Q. Gambler?

A. I couldn't tell you; I have seen him at the race track.

Q. Hasn't he been to your apartment?

A. I beg your pardon?

Q. Hasn't he been to your apartment?

A. No, no.

Q. How about Socks Lanza, is he a good friend of yours?

A. Yes, he is a friend of mine.

Q. How long have you known him?

A. Six or seven years.

Q. He has been to your apartment, hasn't he?

A. Yes.

Q. And you see him at places other than your apartment?

A. Well, I have seen him, yes.

Q. You have not seen him in the last few months?

A. That is right.

Q. And do you know whether or not he has been convicted of crime?

A. I know he had one conviction, as far as I knew; a Federal crime of some kind.

Q. Well, where is he now?

A. Now? Now he is convicted in the State.

Q. That is not on the Federal charge?

A. No, I knew of the conviction prior to that.

[fol. 513] Q. So you know he has been convicted in the Federal Courts?

A. That is right.

Q. And you know that at the present time he is in jail?

A. That is right.

Q. Do you know what he was convicted of this year?

Mr. Sheridan: I think, your Honor—

The Referee: Doesn't he say he doesn't know?

Mr. Sheridan: He does know he was convicted, but to go into the nature of the crime—

The Referee: Well, he doesn't know what he was convicted of.

Mr. Sheridan: Well, I mean, even if he did, unless you could tie it up with this respondent—

The Witness: (Examining photograph) This is Joe Lanza.

The Referee: In this particular case he does not know what he was convicted of, so there is not much use arguing about it.

Q. I show you a picture; do you recognize it?

A. Yes, sir.

Q. Who is it?

A. Joe Lanza.

Mr. Hogan: I offer it for identification.

(Photograph marked Petitioner's Exhibit 5 for identification.)

Q. Do you know Al Capone?

A. Slightly.

Q. How long have you known him?

A. Oh, probably a few years before he went to jail.

[fol. 514] Q. How long would you say, a few?

A. I would have to go back ten or twelve years.

Q. You knew him ten or twelve years?

A. I knew him a few years. He has been in jail ten years, so I could not have seen him since.

Q. Well, you knew him before he went to jail?

A. That is right.

Q. So you know him ten or twelve years?

A. I knew him from twelve years back.

Q. At least; and you know he was convicted of crime?

A. Yes.

Q. Where did you meet him?

A. Oh, I met him probably in Chicago, I cannot tell you the specific place; or maybe in Florida, maybe at a race track or somewhere.

Q. Do you know Johnnie Torrio?

A. No.

Q. Do you know Frank Nitti?

A. I know him slightly.

Q. Where did you meet him, Chicago?

A. I met him in Hot Springs, I met him in Florida.

Q. In Chicago?

A. I met him in Chicago.

Q. Wasn't he an associate of Capone?

A. Well, they were friends.

Q. Do you know Rocco Pompillio?

Mr. Sheridan: What is the last name?

Mr. Hogan: P-o-m-p-i-l-l-i-o.

Q. Do you know him?

A. I wouldn't know, unless you show me a photograph. I wouldn't know him by that name.

Q. Well, do you know that man (showing witness photograph)?

A. Yes.

[fol. 515] Q. What do you know him as?

A. I just knew him as Rocky.

Q. How long have you known him?

A. Oh, I knew him four or five years.

Mr. Hogan: I ask that it be marked for identification.

(The photograph was marked Petitioner's Exhibit 6 for identification.)

Q. You know him pretty well, don't you?

A. Yes.

Q. This Rocko, has he been convicted of crime?

A. Yes.

Q. Now, Joey Rao, from Harlem, do you know him?

A. Yes.

Q. How long have you known him?

A. Probably ten or twelve years.

Q. Has he been convicted of crime?

A. Yes.

The Referee: What is this man's name?

Mr. Hogan: Rao, J-o-e-y R-a-o.

Q. Is that Joey Rao (showing witness photograph)?

A. That is Joey Rao.

Mr. Hogan: Mark it for identification.

(The photograph was marked Petitioner's Exhibit 7 for identification.)

Q. George Uffner, do you know him?

A. Yes.

Q. You know him very well, don't you?

A. Yes.

Q. Play golf with him?

A. Yes.

[fol. 516] Q. See him at your apartment?

A. Yes.

Q. Has he been convicted of crime?

A. Yes.

Q. Do you gamble with him also?

A. Well, we golf.

Q. Don't you gamble, in addition to golfing (showing witness photograph)?

A. No, just golfing.

Q. Just golfing?

A. Yes.

Q. Is that Uffner (referring to photograph)?

A. Yes, sir.

Mr. Hogan: Mark it, please.

(Photograph marked Petitioner's Exhibit 8 for identification.)

Q. Do you recall this question and answer:

• "Q. Do you bet with him also?

A. Well, I do some betting with him, and we play golf."

Do you remember that, with respect to Uffner? Do you remember my asking you that question before the Grand Jury?

A. Well, I might have. Yes, now you refresh my mind, I might have bet with him, yes.

Q. You did bet with him?

A. Yes.

Q. Do you know Nick Rattini?

A. Yes.

Q. Do you know him by that name or another?

A. I just know him by Nicky.

Q. Nicky. Don't you know him by Nick Perry also?

A. Oh, yes, Nick Perry.

Q. You are vefy friendly with him, play golf with him, very friendly?

A. Yes.

Q. What is his business?

A. I don't know his business.

Q. How long have you known him?

A. A few years.

Q. Is that he (showing witness photograph)?

A. Yes.

Q. He has a criminal record?

A. Not that I knew of.

[fol. 517] Q. Did you ever hear he was in jail?

A. Well, I might have heard of it; not that I knew of it.

Q. You have heard that he was in jail, though?

A. Yes.

Mr. Hogan; Mark it, please, for identification.

(Photograph marked Petitioner's Exhibit 9 for identification.)

Q. Do you know Trigger Mike Coppolo?

A. I know Mike Coppolo, yes.

Mr. Sheridan: Your Honor—

Q. Did you ever hear him referred to—

Mr. Sheridan: Wait just a moment.

Mr. Hogan: I am sorry.

Mr. Sheridan: I object to the form of the question, Trigger Mike Coppolo. May we ask the name, and let the witness know if he is known under that name.

Q. Do you know Mike Coppolo?

A. Yes.

Q. Did you ever hear him referred to as Trigger Mike?

A. No.

Q. You never did?

A. No.

Q. Never read that in the newspaper?

A. No, not that I can remember.

Q. How long do you know him?

A. Six or seven years.

Q. Do you know that he is convicted of crime?

A. No.

Q. You don't know that?

A. No.

[fol. 518] Q. Are either of those two men Coppolo (showing witness photograph)?

A. Yes.

Q. Which one, the one on the left or the right?

A. This one here, which is on my left.

Mr. Hogan: On your left. Mark them both for identification.

(The photograph was marked Petitioner's Exhibit 10 for identification.)

Mr. Sheridan: May I see that, please (examining photograph).

Q. Do you know the person on the right hand side here (on Petitioner's Exhibit 10 for identification)?

A. Yes.

Q. Who is that?

A. Lepke.

Q. Also known as Louis Buckhalter?

A. That is right.

Q. How long have you known Lepke?

A. Slightly, probably ten years.

Q. And do you know that he has been convicted of crime?

A. Yes.

Q. Do you know Joe Baker?

A. Yes.

Q. He is a very good friend of yours?

A. No.

Q. Don't you see him frequently at the Madison?

A. I see him, he lives at the Madison Hotel. I don't go there to meet him.

Q. You see him often, don't you?

A. Around the Madison, when I go in there for a cocktail.

Q. I show you a picture; do you recognize it (showing witness photograph)?

A. Yes.

Q. Who is that?

A. Joe Baker.

Q. You know that he has been convicted of crime?

A. No.

Mr. Hogan: Mark it for identification, please.

(The photograph was marked Petitioner's Exhibit 11 for identification.)

Q. Now you know Lucky Luciano?

A. Yes.

Q. You knew him very well, didn't you?

A. Well, I knew him.

Q. How long have you known him?

A. Ten or twelve years.

Q. Wasn't he a pal of yours?

A. I would not call him a pal, no.

Q. Did you see him in Hot Springs, too?

A. Yes, I have seen him in Hot Springs.

Q. And you know he has been convicted of crime?

A. Yes.

Q. Is that his picture (showing witness photograph)?

A. Yes, sir.

Mr. Hogan: Mark it, please.

(Photograph marked Petitioner's Exhibit 12 for identification.)

Q. Now did you know Dutch Schultz?

A. Well, I knew him slightly. I have seen him around.

Q. You knew he had a criminal record?

A. Yes.

Q. You have been in his presence, haven't you? You have been with him to places?

A. No.

Q. Never been with Schultz?

A. No.

Q. Where would you meet him?

Q. A. Just like I met a thousand of other people; into a club, Madison Square Garden.

[fol. 520] Q. Did you know him?

A. Yes, I knew him. He would say hello, and I would say hello to him. I want you to understand, Mr. Hogan, that I never had any business or dealings with any one of these people, aside from ones I mentioned before; Joe Adonis and Kastel.

Q. But you associated with these people?

A. And I have a bank of real important friends of mine who I don't care to mention, also.

Q. Didn't some of these persons sit down at the table with you at the Madison Hotel?

A. Well, yes, they would sit down and have a drink.

Q. How about Louis Shomberg, alias Dutch Goldberg; do you know him?

A. No, I don't believe I know him.

Q. You don't believe you know him?

A. Well, show me the picture.

Q. I will show you the picture first, yes (handing witness photograph)†.

A. Yes, I know him.

Q. Do you know whether or not he has been convicted of crime?

A. Dutch Louis, or something, I didn't know his name. That is why I said I didn't know him.

Q. Do you know whether or not he has been convicted of crime?

A. No, I don't believe I do.

Q. Have you heard that he had a criminal record?

A. I don't recollect; I might have.

Q. I read you your Grand Jury testimony on that:

"Q. You have heard that he has a criminal record?

A. Yes."

Is that the truth?

A. Well now—yes, I might have.

Mr. Hogan: Mark this, please.

[fol. 521] (The photograph was marked Petitioner's Exhibit 13 for identification.)

Q. And Owney Madden, do you know him?

A. Yes.

Q. See him in Hot Springs?

A. He is a native of Hot Springs.

Q. Do you see him there?

A. Yes.

Q. You knew him when he was in New York also, didn't you?

A. Very slightly when he was in New York.

Q. How long have you known him?

A. When I say slightly, he was just an acquaintance.

Q. How long have you known him?

A. Oh, probably fifteen years.

Q. You know he has been convicted of crime?

A. Yes.

Q. Do you know Morris Zeig, known as Little Ziggy?

A. Slightly, yes.

Q. Anticipating Mr. Sheridan, have you ever heard him referred to as Ziggy?

A. Yes.

Mr. Sheridan: I don't mind "Ziggy", after "Trigger Mike."

Mr. Hogan: I thought maybe you might object to "Little."

Q. You have heard him referred to as Little Ziggy?

A. Ziggy, yes.

The Referee: What is his name?

Mr. Hogan: Morris Zeig, Z-e-i-g.

Q. And he was a friend of yours?

A. Just an acquaintance.

[fol. 522] Q. Do you know that he was convicted of a crime?

A. No.

Q. Never heard of that?

A. No.

Q. How about Patsy Dikes—he is a good friend of yours, isn't he?

A. Just a friend of mine, yes.

Q. Do you know he has been convicted of crime?

A. No.

Q. Never heard of that?

A. No.

Q. Do you know Vito Genovese?

A. No.

Q. Do you know Ciro Terranova—did you know him?

A. No, I didn't know him.

Q. You never knew him?

A. No.

Q. Tony Bender?

A. Yes.

Q. Do you know that he has been convicted of crime?

A. No.

Mr. Hogan: That is all your Honor.

The Referee: Take a short recess.

(Short recess.)

FRANK COSTELLO, resumed the stand:

The Referee: Anything further, Mr. District Attorney?

Mr. Hogan: No. No further questions.

The Referee: All right.

Cross examination.

By Mr. Sheridan:

Q. Now, Mr. Costello, I am going to ask you a few questions, not to pry into your personal affairs, but if they are [fol. 523] of a personal nature, please overlook. It's necessary. Have you during the last nine or ten years tried to conduct your life in a decent way?

A. Yes, sir.

Q. I mean, where do you live?

A. 115 Central Park West.

Q. Now, that is Central Park West. And you lived how long in that apartment?

A. About seven years in the same apartment.

Q. Then do you mind answering me this further question: What do you pay for your rent of that apartment?

A. About \$3600 a year.

Q. And about how many rooms does that apartment consist of?

A. Seven.

Q. Are you married?

A. Yes, sir.

Q. And you are married to the one wife all during your life?

A. Over 25 years.

Q. 25 years. And have you lived in that apartment for seven years?

A. Yes, sir.

Q. And did you live near there before that?

A. I've lived within a radius of two miles for about 47 years.

Q. Now, you lived also for eight years in another place, didn't you?

A. Yes, sir.

Q. Where was that?

A. 241 Central Park West.

Q. And I dare say, prior to the shortage of gasoline you had an automobile of your own?

A. Yes, sir.

Q. I see you are well tailored. Do you always dress that way?

A. Yes, sir.

Q. In other words, you are not parading into this court today dressed any differently than you would on any other day?

A. No, sir.

[fol. 524] Q. Your suits are tailored. And you meet people of refinement?

A. The best.

Q. The best?

A. Yes.

Q. And you have had business relationships with people of the best standing?

A. Well, I wouldn't call it business, but they are personal friends of mine, social friends of mine.

Q. Have you stayed at their homes?

A. And they stayed at my home.

Q. And have you had your wife in their company?

A. Yes.

Q. Now, how long have you known Judge Aurelio?

A. Since last February, I believe.

Q. Of this year?

A. Of this year.

Q. And the woman alongside of him—

Mr. Sheridan: Will you please stand up, Mrs. Aurelio?

(A woman stands in the court room.)

Q. How many times did you meet Judge Aurelio's wife?

A. I believe twice.

Q. In the company of other people?

A. Yes.

Q. Now, since 1934 have you been engaged in the slot machine business in New York State?

A. Since 1934?

Q. Yes.

The Referee: What year is that?

Mr. Sheridan: 1934.

The Referee: 1934?

Q. 1934. After 1934?

A. In the State of New York?

Q. Yes.

A. No, sir.

[fol. 525] Q. Your business activity was confined to the State of Louisiana?

A. Louisiana.

Q. And the list of names of men that were mentioned—did you ever have any business relationship with any of those men, other than the two you have mentioned?

A. No, sir.

Q. Did you ever have any business with this man Lepke?

A. No, sir.

Q. Did you ever have any business with this man that they call Gurrah?

A. No, sir.

Q. Now, you do go to the race tracks, don't you?

A. Very often.

Q. Both here and in Florida?

A. Florida and Louisiana.

Q. And Louisiana; and you meet people of all walks?

A. That's right.

Q. But as far as your own behavior during the last eight or nine years, has it been your ideal to try to mix with the better people?

A. Absolutely.

Q. I don't want you to make a confession, but tell me, what have your impulses been—to meet with the better people?

A. With the better. And I have met the better.

Q. And I dare say the income you derive from your business in Louisiana is a fairly substantial one, isn't it?

A. Yes, sir.

Q. And when you made a settlement of the income tax question, both the State and the Federal, you employed the firm of Greenbaum, Wolff & Ernst?

A. Yes, sir.

Q. That is Judge Greenbaum's old firm?

A. Yes, sir.

Q. And Mr. Morris Ernst was your attorney?

A. Yes, sir.

Q. Now—

A. I beg your pardon, I want to make one correction. [fol. 526] My State was represented by George Mortimer Levy.

Q. The Federal by Greenbaum, Wolff & Ernst—well, it is a matter of no moment.

A. No. George Mortimer Levy.

Q. Now, you say that you met Judge Aurelio in the year 1943, in or about the month of February?

A. Yes, sir.

Q. Now, during all this time that they speak of association with the Underworld, did you ever have any contact

with that man while he was a Magistrate of the Criminal Court of the City of New York?

A. Never knew him. Never knew the Judge in my life until February.

Q. As I understand it you met him through a doctor called Sarubbi, is that correct?

A. Yes, sir.

Q. And Dr. Sarubbi—that is not a nickname. He is a medical doctor?

A. He is a medical doctor, yes.

Q. And he is a graduate of Fordham University?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And he is an Assembly District leader in the lower part of the East Side of Manhattan?

A. Yes, sir.

Q. And he was the first man that spoke to you, to interest yourself in behalf of Judge Aurelio?

A. Yes, sir.

Q. Now, this man that they call Jimmy Kelly—he also is a district leader?

A. Yes, sir.

Q. On the Lower East Side. His correct name is Jimmy DiSalvio?

A. Yes, sir.

Q. Now, were you examined, both before the Grand Jury and privately, as to your full relationship with Judge Aurelio?

A. Not privately, but in the Grand Jury.

[fol. 527] Q. In the Grand Jury?

A. Yes, sir.

Q. And you told the truth?

A. Yes, sir.

Q. Of the different occasions, I think five in number all told, that you met him?

A. Yes, sir.

Q. Now, in answer to a question that was propounded to you by Mr. Hogan today, I understood you to say that you had given Judge Aurelio your private telephone number. So I understood you to say. Did Judge Aurelio ever

· speak to you during any time from February up until the morning that he called you on your private wire?

A. Never.

Mr. Sheridan: Your Honor, I take it that this man's private telephone wire was tapped for months prior to the day on which this telephone communication was gotten—

Mr. Hogan: I object to that, if it is in the form of a question.

Mr. Sheridan: Well, I ask for him then to produce to your Honor the order, when it was obtained, for the tapping of this man's wire, and the length of time—because I am going to use it later on for the purpose of showing that the first and the only occasion when Judge Aurelio phoned him was on the morning after he was nominated, because of a telephone call that took place the night before.

Mr. Hogan: I take it—

Mr. Sheridan: May I have the order?

Mr. Hogan: I take it this is not cross examination?
[fol. 528] The Referee: No.

Mr. Sheridan: No, none of this is cross.

The Referee: Do you want to furnish the Senator with this order?

Mr. Hogan: I would be happy to. I don't know whether we have it with us, Senator, but I will be happy to produce it.

Mr. Sheridan: Before I finish?

Mr. Hogan: Oh, sure.

Q. Now, the night of the nomination, after he was nominated by the Democratic Organization, you telephoned Judge Aurelio at his home?

A. Yes, sir.

Q. And I take it Judge Aurelio's telephone is probably listed in the telephone book?

A. Yes, sir.

Q. Did you have a conversation with some woman who answered the phone, in which you said that you phoned—

left your name and number and asked to have the Judge phone you the following day?

A. Yes, sir.

Q. Now, is that the first telephone call that ever passed over that private wire to your apartment?

A. Yes, sir.

The Referee: Do you mean from Mr. Aurelio?

Q. From Mr. Aurelio to you?

A. Yes, sir.

The Referee: Judge Aurelio.

Q. So that as I understand it, from February 1943 up until August 23rd, or whatever date the Democratic Judicial Convention was held, he had never telephoned to you over that private wire?

A. No, sir.

Q. And you are sure about that?

A. Positive.

[fol. 529] Q. To briefly restate the times that you met, number one, in February 1943?

A. Yes, sir.

Q. In the Webster Hall at East 11th Street in Manhattan, the Lower East Side—a beef steak was held, which is a political function, is that correct?

A. Right.

Q. Jimmy Kelly's district, and you were introduced to Judge Aurelio on that night. You believe the man who introduced him was Dr. Sarubbi?

A. Yes, sir.

Q. His neighbor on the East Side?

A. That is right.

Q. And a Democratic leader. And you recall meeting Mr. Joseph Loscalzo?

A. Yes.

Q. He was there that night?

A. He was at the beef steak.

Q. I take it from the names that both of these men are of Italian extraction?

A. Yes, sir.

Q. Loscalzo is presently—

A. District Attorney.

Q. A political leader in Queens?

A. An Assistant District Attorney.

Q. And years ago was an Assembly man?

A. That is right.

Q. Now, the next time that you spoke to or met with Judge Aurelio was where? Was that the meeting up at Mr. Kennedy's or was it at this corn beef and cabbage affair that was held down there?

A. Well, I testified to that. Now, I want to get some notes on that because I—

Q. Well, there were five meetings?

A. That is right.

Q. Once at Webster Hall, at a beef steak?

A. Yes.

Q. Once in the same place they had a dinner that they called a corn beef and cabbage?

A. Yes. I met him there.

Q. And Congressman Kennedy—we will give him the title once in a while, in addition to "Mike"—Congressman Kennedy—

[fol. 530] Mr. Hogan: Senator, I haven't called him "Mike."

Mr. Sheridan: Oh—

Mr. Hogan: I am willing to give him all the titles that he has.

Q. (Continuing) Congressman Kennedy's office?

A. That is right.

Q. In General Motors Building?

A. That is right.

Q. The next time, in this Night Club, the Copablanca, is that it—

A. Copacabana. The Martinique—

Q. And the Martinique. Now, the Martinique—Lepke and Trigger Mike, Dodo, Feasy—all of these characters weren't with you, were they?

A. No.

Q. Or Little Nitti, Al Capone—none of them were with you, were they?

A. No, sir.

Q. Your wife, Surrogate Savarese of Queens County, is that right?

A. Yes, sir. Judge Savarese.

Q. And this woman (indicating)—Mrs. Aurelio—the Judge—these people were sitting down with you, weren't they?

A. The Judge, yes.

Q. And Congressman Kennedy and Clarence Neal and Bert Stand?

A. That's right.

Q. They had a drink at the bar?

A. That's right.

Q. And just to get an idea of your social standing, you had met these gentlemen just shortly before at the St. Regis Hotel at the Cocktail Bar?

A. The King Cole Room of the St. Regis.

Q. So that in the last eight or nine years, you were not conducting yourself like a rowdy-dowdy, or a plug-ugly type—you were carrying yourself with all the airs of refinement, weren't you?

A. Absolutely.

Q. And you tried to improve your standing?

A. Yes, sir.

[fol. 531] Q. Did you ever take Judge Aurelio and tell him of your past?

A. No.

Q. Did you ever sit down and tell him of any of these associates?

A. No, sir.

Q. Did you ever tell him that you had a participating interest in the Piping Rock gambling establishment?

A. No, sir.

Q. Did he know it?

A. No, not to my knowledge.

Q. And with all your influence that has been portrayed here, the question of the designation of a judicial candidate is the vote of 35 or more leaders, isn't it?

A. That is right.

Mr. Hogan: Now, your Honor, I don't think that is a question, I think the Senator is testifying.

Mr. Sheridan: All right. I will try to show it. All right.

Q. You do know under that processes of the Democratic form of government, political men do not live in a vacuum. You know that, don't you?

A. Yes, sir.

Q. They go out and they meet their neighbors, and we know, whether it is Democratic or Republican, whether it is Mr. Willkie or anybody else—there is such a thing as a pre-convention solicitation of help, don't you?

A. Yes, sir.

Mr. Hogan: I must object, your Honor, in that this witness has testified he has never voted in his life, he is not a member of a party, and I think it better come from another witness as to what persons in politics know.

The Referee: Well, he is interrogating him as an on-looker.

[fol. 532] Mr. Sheridan: An on-looker.

Mr. Hogan: Oh.

Q. So that I take it, whether you voted or not, you know the processes of the democratic form of government, don't you?

A. Yes, sir.

Q. In other words, that some years in the wisdom of political leaders it is well to take care of, let's say an Italian representation; right?

A. Yes, sir.

Q. And if you live in another part of the city, you have an eye towards the Polish contingent?

A. That's right.

Q. And another time you will take into consideration whether you will have a man of Jewish or of Irish extraction; and once in awhile whether a man is a protestant or a Catholic; you know that, do you?

A. Yes, sir.

Q. Now, Dr. Sarubbi interested you in behalf of Judge Aurelio?

A. Yes, sir.

Q. And I dare say these men told you something about him?

A. Told me he was probably the finest man around.

Q. He told you he had been—

A. A fine record; World War veteran.

Q. A veteran of the World War?

A. District Attorney.

Q. That he had the backing of past Commanders of the Foreign Wars; that he was a member of various societies—

Mr. Hogan: I beg your pardon; did he tell you that?

Q. Did he tell you those things?

A. He told me about the World War and he told me about the District Attorneyship and being a Magistrate.

Q. Did he tell you that Mayor LaGuardia—

[fol. 533] Mr. Sheridan: And I think the Court will take judicial notice that Mayor LaGuardia is not a Democrat—

Q. (Continuing) —reappointed Magistrate Aurelio at the termination?

A. Yes, sir.

Q. He told you that?

A. Yes, sir.

Q. And you did use your influence together with others—

A. That is right.

Q. —to try to help, in getting the nomination, is that right?

A. Yes, sir.

Q. But you don't think you're the man that solely and alone could bring the nomination about?

A. No, I don't think so.

Mr. Hogan: Objected to, your Honor, and I move to strike it out.

The Referee: I will strike it out.

Q. Well, did you speak to various district leaders?

A. Yes, sir.

Q. Let us see how many you spoke to of the 35. You spoke to Clarence Neal?

A. Yes, sir.

Q. You spoke to Dr. Paul Sarubbi?

A. Yes, sir.

Q. Number two. You spoke to Jimmy Kelly?

A. Yes, sir.

Q. Three. You spoke to Abe Rosenthal?

A. That's right.

Q. And, all important, you spoke to Congressman Kennedy?

A. Yes, sir.

Q. Now, did you speak to any other leaders?

A. No.

[fol. 534] Q. You spoke to Bert Stand?

A. Well, he's not a leader.

Q. No, but you spoke to him?

A. Yes.

Q. To put in a kind word?

A. Yes, I spoke to Bert Stand.

Q. And during that period, from February up to date, outside of those five occasions when you met Judge Aurelio, did you ever go out to night clubs with him other than that?

A. No, sir.

Q. Did you ever take him to gambling establishments?

A. No, sir.

Q. Did you ever take him and introduce him to Trigger Mike, or Lepke or Gurrah, or any of these people?

A. No, sir.

Q. Did he ever see you in their company?

A. No, sir.

Q. Did he ever go up to Saratoga Springs when you had this interest in this place up there?

A. No, sir.

Q. Did you ever see him at a race track in your life?

A. No, sir.

Q. Now, you are reluctant to give the names of what you call nice, decent people, that you met with socially during the last seven or eight years?

A. They are of the highest character.

Q. And you won't mention their names, will you?

A. And big utility men.

Q. And you wouldn't mention their names?

A. No, sir.

Q. And you told that to Mr. Hogan in his office, and you gave a full story off the record?

A. I don't remember. I don't know if I told Mr. Hogan that. But I want to make this statement—that I do know [fol. 535] some of the finest and biggest business men in the country, and I wouldn't mention names because I wouldn't want to embarrass them. I have been embarrassed enough. I try to lead a decent life. I gamble, but I never stole a nickel in my life, and my word is my bond.

Q. And when you say you met with these people, it wasn't a casual incidental meeting, but rather it was a friendship that maintained for years?

A. That's right; absolutely.

Q. Well, sir, if you don't want to disclose the names, I shan't press it. Did this man, Magistrate Aurelio, from February to date, ever meet any of those people that you mentioned, in your company?

A. No, sir.

Mr. Sheridan: Now, your Honor, I would like—

The Referee: I don't quite understand that question—

Mr. Sheridan: Well, the question is this—

(Last question and answer repeated by the stenographer as recorded.)

Q. I mean of the people on the seamy side of life, and the bad, black men?

A. I said, "No, sir."

Q. You never did?

A. No, sir.

Q. Never associated with them, is that correct?

A. Correct.

Mr. Hogan: What was that last question?

(Last question and answer repeated by the stenographer as recorded.)

Mr. Hogan: I don't think that is quite clear. Do you mean the witness didn't associate with them?

Mr. Sheridan: No.

[fol. 536] Q. Did Magistrate Aurelio ever associate with the list of men whose pictures were presented to you and you were asked if you knew that they had served a sentence?

A. No, sir.

Q. Now, in the last eight or nine years, have you been in business with any of those men?

A. No, sir, outside of one—that I have mentioned.

Q. The two men. And was it—I will ask you another question: You were interrogated about your activities back in bootlegging. You remember that, in 1920 and 1924, and 1925 and 1926?

A. Yes, sir.

Q. You were asked the questions, "Did you charter boats?" Do you remember that—by Mr. Hogan, he asked you.

A. Yes.

Q. Did you have trucks, did you smuggle liquor in, now that sufficient time has elapsed—do you mind telling me this: You didn't do that open and notorious?

A. No. I was just honest to say that I did, but—

Q. But you kept it quiet?

A. But I really didn't.

Q. But you kept it quiet, didn't you?

A. Yes, sir.

Q. You didn't go out telling everybody?

A. No. And I never chartered a boat.

Q. You never chartered a boat, and you brought in liquor?

A. I brought in liquor.

Q. And you sold liquor?

A. But I personally never did it.

Q. But you had no associations with this man back in 1915 (indicating)?

A. No, sir.

Q. Now, in 1915 or 1916 when you were sentenced to the Reformatory for possessing a gun, you didn't know any

member of his family, or had any association with Judge Aurelio at that time?

A. No.

[fol. 537] Q. I don't like to be constantly repeating, but had you ever met Judge Aurelio prior to February 1943?

A. Never met or saw the gentleman.

Q. Now, as far as Dr. Sarubbi is concerned—Dr. Sarubbi is a medical doctor, isn't that correct?

A. Yes, sir.

Q. He attended you as a physician?

A. Yes, sir.

Q. As a matter of fact, he sent you into St. Vincent's Hospital for an operation for your throat, is that correct?

A. That is right, yes, sir.

Q. And he has been your intimate friend over a period of four or five years?

A. Five or six years, yes.

Q. So that would it be fair to state that your interest, whatever it was, in Judge Aurelio, was first brought about through the intervention of, or help being asked of you from Dr. Sarubbi?

A. Yes, sir.

Mr. Sheridan: Mr. Hogan, will you have tomorrow the order for the tapping of this man's wire, and the date of that, so that I may continue?

Mr. Hogan: I think this is a copy, Senator—will you excuse me just a moment, Judge?

(Handing a paper to Mr. Sheridan.)

The Referee: Yes.

Q. How long have you had your private telephone listed under its present number?

A. On its present number?

Q. Yes. How long have you had a private telephone?

A. Always. Always.

Q. Well, now, on May 7, 1943, your private telephone is tapped. It is May 7, 1943.

Mr. Hogan: Well, Senator, why not offer the—

Mr. Sheridan: No, now, please—

[fol. 538] Mr. Hogan: Well, then it isn't in the form of a question, and I object.

Mr. Sheridan: Well, I am going to ask him the question.

Q. Prior to May 7, 1943—

Mr. Sheridan: Well, may I have a concession on the record that on May 7, 1943, an order was signed by Judge Jonah J. Goldstein, Judge of the Court of General Sessions, authorizing the District Attorney to tap the private telephone of this witness?

Mr. Hogan: So stipulated.

Mr. Sheridan: And may I ask further upon whose application that was made?

Mr. Hogan: No, I think not.

Mr. Sheridan: It is going to be important later on.

Mr. Hogan: I would be happy to say it was on the application or an affidavit of an assistant in my office.

Mr. Sheridan: That is all I wanted to know.

Mr. Hogan: But I don't think you—

Mr. Sheridan: That is all I want to know. You see, under the law, it may be done by a number of people. And is it further stipulated that it was upon an affidavit and an application of the District Attorney of New York County?

Mr. Hogan: That is right.

By Mr. Sheridan (Continuing):

Q. How long prior to May 7, 1943, did you have that [fol. 539] telephone in your house?

A. Since I have been living there.

Q. How long have you been living there?

A. Seven, eight years. Seven years, I believe.

Q. And did you have the same number?

A. No.

Q. How long did you have the number?

A. That number, I probably got that number about two years, I believe.

Q. All right. And outside of trips or visits that you

made to Florida in the winter, you spent the major part of your time at your apartment in New York?

A. At my apartment, yes.

Q. Is that correct?

A. Yes.

Q. You stated in answer to Mr. Hogan's questions that you were in some real estate business, is that correct?

A. Yes.

Q. You were also represented by the firm of Greenbaum, Wolff & Ernst, in some private business?

A. And still am.

Q. Did you have business with officials or men in the RCA Corporation? I am not going to ask the names.

A. Yes.

Q. Was that a business venture?

A. Yes.

Q. Did you also have business with reference to a photo-vision machine?

A. Yes, sir.

Q. And what is a photo-vision machine?

A. It was called a fono-vision.

Q. What is that?

A. It's a miniature moving picture machine. You insert a coin, and it plays with a picture, with either a short story or a dance or song.

Q. You were in that business?

A. Well, I made an investment in that business, yes.

[fol. 540] Q. And you also have been in the real estate business?

A. Yes, sir.

Q. I take it that during the last eight or nine years you were concerned with trying to create an outward appearance concerning yourself, weren't you?

A. Yes, sir.

Q. I mean, you lived at Central Park West and—

A. For 15 years.

Q. For 15 years. And you played golf?

A. Yes.

Q. Do you belong to a golf club?

A. Yes, sir.

Q. And what is the name of it?

A. Pomenok.

Q. A country club out in Long Island?

A. Yes.

Q. And you played with your friends out there?

A. Yes.

Q. If you had occasion to go to a hotel, you would go to the Waldorf-Astoria in New York?

A. I have been patronizing the Waldorf-Astoria for 20 years.

Q. That's a pretty good hotel in New York, isn't it?

A. Well, I think it is.

Q. And you go to the St. Regis?

A. Yes.

Q. And where is that located?

A. 5th Avenue and 55th Street.

Q. And do you have association with people of refinement and of standing?

A. Yes. The highest type.

Mr. Sheridan: Your Honor, may I make this statement? I can understand this man's position, in a case that has attracted so much attention—if he is reluctant about mentioning these people, I as the attorney for the respondent suggest that particular phase be heard in camera. I only limit it to this part, and his association [fol. 541] and his contact. It won't take long. Mr. Hogan, would you do that?

Mr. Hogan: I have no objection, your Honor.

Mr. Sheridan: Anything with reference to local affairs and local politics, no. But to spread upon the record names of decent men of standing in Washington and New York that this man has met and associated with—I am reluctant about it, and I think that that is reasonable and best. I spoke to this man the first time in my office Saturday, and he told me that he will not give it, and I shan't press it.

The Referee: Well, let us do it tomorrow morning.

Mr. Sheridan: Yes, we can do that then.

The Referee: Unless there is objection. We can do it in a few minutes tomorrow morning.

Mr. Hogan: Are you through, sir?

Mr. Sheridan: Yes, I am finished.

The Referee: Perhaps you could do it this afternoon before we adjourn.

Mr. Sheridan: Well, I don't want to press your Honor.

The Referee: Suppose you ask such questions as you want to on redirect on other matters and leave this rehabilitation, as you might call it—I mean by prominent associates.

Redirect examination.

By Mr. Hogan:

Q. Now, you testified that you have been going to the Waldorf for 20 years?

A. Yes, sir.

Q. And other hotels?

A. Yes, sir.

[fol. 542] Q. And that you have lived on Central Park West for the last 25 years?

A. That is right.

Q. So your habits haven't varied in that respect, have they?

A. That is right.

Q. They have been the same?

A. That is right.

Q. And you have testified that you meet the best type of people?

A. That is right.

Q. You know the worst too, don't you?

A. Yes.

Q. And you continue to see the worst, don't you?

A. Well, if they are unavoidable, yes.

Q. You haven't stopped seeing Adonis and Lanza and those people, have you?

A. Well, I don't look for them, Mr. Hogan. I have no business outside of that Saratoga business.

Q. Don't they telephone you?

A. Well, when you say do any telephoning, you will have to mention specific names. Who telephoned.

Q. Adonis?

A. No.

Q. Adonis doesn't telephone you?

A. No.

Q. Do you recall this question and answer—

Mr. Sheridan: Will you kindly submit the question to the witness?

Mr. Hogan: No. I think this is on impeachment.

Mr. Sheridan: Your own witness.

Mr. Hogan: That is right.

The Referee: He may impeach the witness by his sworn testimony.

Q. (Reading) "Q. Let me read you this conversation, July 23, 1943, Frank Costello to Joe Adonis.

"Adonis: Hello.

[fol. 543] "Costello: Hello, Joe, how are you?

"Adonis: OK.

"Costello: What are you doing today?

"Adonis: Nothing.

"Costello: Want to play some golf?

"Adonis: No. I can't play. Where are you going?

"Costello: Pomenok.

"Adonis: What time?

"Costello: We can kick it around, and I can talk to you.

"Adonis: I forgot. I have appointments.

"Costello: I've got to see you.

"Adonis: How about 4:30 or 5:00?

"Costello: That is OK. Over there?

"Adonis: Yes.

"Costello: OK, Joe."

Do you recall that conversation?

A. Yes. That conversation I recall.

Q. What did you have to see him about?

A. What year was that? What month was that?

Q. July of 1943. So it wasn't Piping Rock?

A. Well, I don't recall what I wanted to see him about.

Q. Well, you say here, "I've got to see you."

A. But I don't—

Q. You weren't avoiding him in July of 1943, were you?

A. No.

Q. You met him at the Madison during those months too, didn't you?

A. Yes.

Q. And you met Zwillman, didn't you?

A. I believe he has been at the Madison, yes.

[fol. 544] Q. And you met Meyer Lansky, didn't you?

A. Yes.

Q. And Socks Lanza was in your apartment before he went to jail, wasn't he?

A. Yes, sir.

Q. You met Augie Pissano in 1942 at the Madison Hotel?

A. Yes. It's a public place, and everybody goes in there.

Q. Do you recall testifying before the Grand Jury that you were with him for an hour on one day, and went to dinner with him?

A. Went to dinner with him?

Q. Yes.

A. I don't recall, but if I testified, I will admit I did.

Q. Yes, and you won't admit if you didn't testify.

A. Well, I just don't recall my testimony there.

Q. So that you haven't discontinued seeing these people, have you?

A. No.

Q. And you don't intend to, do you?

A. Well—

Mr. Sheridan: Oh well—

The Referee: Sustained.

Mr. Hogan: Withdrawn.

Q. Have you had any office since 1934 when you had one at 1860 Broadway?

A. No, outside of my office with the Phono Vision, that I made sort of an office.

Q. How long was that?

A. That is a few years back.

Q. Who makes these photo or phono vision machines?

A. Well, these phono vision machines, they are not made now, because they are out of business.

Q. Who made them a few years ago—Mills Novelty?

A. Mills.

Q. They make the slot machines too, don't they?

A. Yes.

[fol. 545] Q. Juke boxes also?

A. Yes.

Q. And your job is to place them at night clubs and roadhouses and gambling places, isn't it?

A. Place what?

Q. Place slot machines, and phono vision machines and juke boxes?

A. No, sir.

Q. Isn't that what you do?

A. No, sir.

Q. Isn't that your interest?

A. No, sir. Not no phono vision, because there is no such a company existing; and no juke boxes.

Q. Just slot machines?

A. Just a vending machine.

Q. How many times have you been to Louisiana since you started the business there?

A. I have been in Louisiana, since I started business there?

Q. How many times have you been down there?

A. Since 1935?

Q. Yes.

A. Well, I couldn't answer that question.

Q. Well, how many times a year do you have occasion to go there?

A. Two or three times a year.

Q. Now, you have testified on cross-examination that you spoke to Mrs. Aurelio some time or other.

A. No. I didn't testify to that. The telephone call you mean?

Q. Yes.

A. You have reference to the telephone call?

Q. Yes. How many times did you telephone Judge Aurelio?

A. That one particular time.

Q. What particular time?

A. On August 23rd.

Q. Didn't you testify earlier that you telephoned to invite him to the Martinique?

Mr. Sheridan: He said over his private wire, that private 'phone. That is what he said.

Mr. Hogan: I think you are helping him a bit, Senator.

[fol. 546] Mr. Sheridan: No, I am not. I asked him over that private 'phone.

Mr. Hogan: There was not any such testimony.

Q. Didn't you telephon Judge Aurelio to invite him to the Martinique?

A. Yes.

Q. And isn't that the only time you called Judge Aurelio's home?

A. Now that you are refreshing my memory, that is two times I called him. That one time, and that night of the—August 23rd.

Q. Are you quite certain about that?

A. That I can recall, yes.

Q. Do you recall being asked those questions before the Grand Jury?

A. Of how many times I have called him?

Q. Yes.

Mr. Sheridan: Your Honor, on that phase of it, the District Attorney has whatever telephone calls there were between May 23rd—I am willing in behalf of my client to have him put in evidence any call from this man to Judge Aurelio over that private wire, or from Judge Aurelio to him.

Mr. Hogan: Yes. Well, Senator, I don't have any.

Mr. Sheridan: That is the end of that. There is no longer a question of that. You have the messages that went over that wire.

Mr. Hogan: I don't have any call on the night of August 23rd, and that is what I am examining about.

[fol. 547] Mr. Sheridan: All right.

The Referee: Go ahead, Mr. District Attorney.

Q. Do you say at this time that you telephoned Judge Aurelio's apartment on the night of August 23rd?

A. Yes.

Q. Were you asked that question before the Grand Jury?

A. I don't believe so.

Q. Well, I will read you these questions—

Mr. Sheridan: Your Honor, I submit that regardless of what the witness testified before the Grand Jury, like on a question here, where they have the telephone conversations, each and every word, asking the witness, you are apt to create in the mind that maybe he might be guilty of perjury or something. It is no longer a question of speculation—

The Referee: Now, there is a chance for failure of memory.

Mr. Sheridan: But they have the intercepted—

The Referee: I know, but as to the witness, I think he may ask this. This is contradictory by his sworn testimony, I assume, of what he said on cross-examination.

Mr. Sheridan: But the point I make is, we are no longer in the realm of thinking or speculation. By my confession he has the absolute accurate questions on the telephone messages.

Mr. Hogan: Well, I accept the stipulation, Senator, and I tell you that I have no conversation from Mr. Costello to Judge Aurelio's apartment on August 23rd, the night of the convention.

[fol. 548] Mr. Sheridan: I don't say it came over his wire. All I say is that Judge Aurelio never used that man's private telephone until the morning after. Now, where he was—where this man was—

The Referee: That isn't contradicted. They are not contradicting that.

Mr. Sheridan: No.

The Referee: They are questioning this man as to the correctness or truthfulness, if you please, of the answer that he gave, that he telephoned the house of Judge Aurelio,—

Mr. Sheridan: Your Honor, maybe—

The Referee: Not the Judge himself, on the evening of the convention.

Mr. Sheridan: Your Honor, one of the issues we had to meet before the Bar Association, and before this, is that the fact that this man, Judge Aurelio, was in possession of the private telephone number of this witness, it showed that an intimacy existed between this man, the underworld character, and the Judge. That is the point.

The Referee: Yes. Well, I think I will allow the District Attorney to ask the question.

Q. I read from your Grand Jury testimony:

"Q. So that you called him on one occasion, and that was to invite him to the Martinique, and then you told him to bring Rosenthal with him?

A. That is right.

"Q. Now, did you ever speak to Mrs. Aurelio on the telephone?

A. I don't believe I did.

"Q. You didn't telephone Aurelio the night of the convention, did you?

A. I don't recall. I might have, but I just don't recall.

[fol. 549] "Q. Well, your best recollection is that you didn't, isn't that true?

A. At present, yes.

"Q. And you would recall it if you did, wouldn't you?

A. Well, I imagine I would."

Now, did you give those answers to those questions before the Grand Jury?

A. Well, of course my memory right now is more refreshed than the Grand Jury.

Q. Oh.

A. And I remember calling Judge Aurelio's home. I didn't speak to Mrs. Aurelio. It was a lady. It might have been Mrs. Aurelio.

Q. But you refreshed your recollection with respect to that, because I asked you the direct question, Mr. Costello.

A. In the Grand Jury Room?

Q. Yes.

A. Well—

Q. You couldn't remember it then?

A. Well, in three days time, Mr. Hogan, you go back; you start fishing. You go back. You get thinking.

Q. But you said your memory was refreshed. Who refreshed it?

A. Myself.

Q. You got to thinking about this?

A. That is right.

Q. And you recall you did?

A. That is right.

Q. Where were you that night?

A. What night?

Q. The night of the convention?

A. The night of the convention?

Q. Yes.

A. Well, I just don't remember where I was the night of the convention.

Q. What time did you make this call?

A. I made the call around 10:00 o'clock.

Q. 10:00 o'clock?

A. Yes.

Mr. Sheridan: Did you make it from your own apartment or outside?

[fol. 550]. The Witness: From my own apartment.

Q. From your own apartment?

A. Yes.

Q. But isn't it true that you gave Judge Aurelio your number, your private number, before the 23rd?

A. I believe I left my number there on the 23rd.

Q. That is not answering the question, whether you left your number or not, did you give your number to Judge Aurelio before the night of the convention?

A. No, I haven't.

Q. Didn't you testify earlier in the day you gave it some time before the Martinique? Didn't you so testify earlier in the day?

A. Well, it's before the Martinique.

Q. So you did give him your telephone number before the Martinique?

Mr. Sheridan: Well, when was the Martinique?

Mr. Hogan: The Martinique, it has been established was Thursday, August 19th, four days before the convention.

Q. Isn't that so, Mr. Costello?

A. Yes.

Q. Thursday, August 19th?

A. That's right.

Q. And you have testified that you gave the telephone number to Judge Aurelio before Thursday, August 19th, isn't that so?

A. I believe I did.

Q. It is the truth, isn't it?

A. Well, I believe I did, yes.

Q. And it's the truth, isn't it?

A. Yes.

Mr. Hogan: That is all.

[fol. 551] Recross examination.

By Mr. Sheridan:

Q. Now, when you say "I believe it is," and then my friend says, "And that is the truth," what do you mean by "believe?"

Mr. Hogan: Now, your Honor, he has testified this morning, and I refreshed his recollection as to the testimony.

Mr. Sheridan: All right.

The Referee: Now you have got both.

The Witness: Well, I—

The Referee: Wait a moment. You both succeeded, as I recall, of getting testimony here in answer to your questions, perfectly properly—one, that he had given it before, and two, that his recollection was that he didn't give it before.

Mr. Sheridan: So may I—

The Referee: Of course we can keep this going forever.

Mr. Sheridan: No, I just want—

The Referee: Well, I am going to give the District Attorney—

Mr. Sheridan: Another chance?

The Referee: The last word.

Mr. Sheridan: Oh, sure. He will have the last word.

The Referee: On this one.

Mr. Sheridan: Surely. It may not be necessary.

[fol. 552] Q. I dare say you as a witness here, when you are asked about what transpired, you are testifying to the best of your ability, isn't that right?

A. That is right.

Mr. Hogan: Now, your Honor, that is argument.

The Referee: Yes.

Mr. Hogan: I object to it.

The Referee: Yes, it is argument.

Mr. Sheridan: All right. All right.

Q. Did Judge Aurelio—

The Referee: Strike it out.

Q. (Continuing) —ever phone your apartment over that private wire from the first time you met him until that one telephone call?

A. No, sir.

Mr. Sheridan: And I take it, your Honor, further that there is no doubt about the truth of that or my friend would have produced another telephone conversation.

Mr. Hogan: Here, you have asked the question, Senator, and I don't think we ought to argue the point. I don't believe you should make a statement to the Court.

The Referee: You have had your answer.

Mr. Sheridan: All right.

Q. So when you say you phoned on the night of the nomination, where did you phone from?

A. I am almost sure it was from my home.

[fol. 553] Q. Well, are you certain about it?

A. Well, no. I'm not even certain about that.

Q. Can you place in your mind as to any other place where you may have phoned from?

A. I might have made it through a restaurant.

Q. But you did phone the apartment of Judge Aurelio at his home, and you spoke to some one, a lady?

A. A lady.

Q. You left your name?

A. Left my name.

Q. And your number?

A. For the Judge to call me in the morning.

Q. And the following morning—

A. He called me.

Q. A little after 8:00, he had that telephone call which we have heard?

A. That is right.

The Referee: How long do you think this testimony would take?

Mr. Sheridan: I think ten minutes. If you want to let it go until the morning—we have had a hard day—would you tell this witness, please, that when we take that information, that that will not be given to the public. He has got to make a full and fair disclosure. I am not his attorney. I met him Saturday for the first time.

The Referee: Well, you are his attorney in this proceeding. We will adjourn now until tomorrow morning at 10:00 o'clock, but the court room will be closed except to those immediately interested in this proceeding, and I will have to exclude the gentlemen of the Press too for these very few moments that it will [fol. 554] take—the idea being, as I understand it, that no names should be given out to the public accidentally, which might tend in any way—I don't say it would, but which might tend in any way—to besmirch the people mentioned. That is your idea, is it?

Mr. Sheridan: All right.

The Referee: And the District Attorney consents to that?

Mr. Hogan: Yes, your Honor.

The Referee: So that a few minutes after we have opened at 10:00 o'clock, we will open the doors. What time do you usually have it?

Mr. Sheridan: 10:30.

The Referee: Well, 10:30. A few minutes later we will let you all come back, or as many as want.

(An adjournment was taken until 10:30 A. M., Tuesday, October 26, 1943.)

• • •

October 26, 1943.

IN CAMERA.

FRANK COSTELLO, a witness for the Petitioner, resumed the stand.

Mr. Wolf: If your Honor please, I am Mr. Costello's attorney. I want to announce the fact. May I be present?

The Referee: Certainly. This is rather extraordinary, to exclude the public, but at the same time it was the request of Mr. Aurelio's counsel, and the District Attorney consented to it.

[fol. 555] Recross examination (Continued).

By Mr. Sheridan:

Q. Mr. Costello, yesterday afternoon as a witness you stated that you would not reveal the names of men and women with whom you have had social and business contact during the past years, and you stated your reason in open Court, and also last Saturday in my office, that you did not want to besmirch the names of people in no way connected with this case. Do you remember that?

A. Yes, sir.

Q. Now will you kindly tell me—or rather, will you kindly state to his Honor, briefly and concisely, the names of various people with whom you have had business and

social relations; and I assure you again that not one word of this testimony will nor can be revealed, and that there is no legal reason for you to persist in your refusal.

The Referee: Now Senator, it will have to be reported—

Mr. Sheridan: And may be reported in camera, too.

The Referee: Reported to the Appellate Division.

Mr. Sheridan: Yes.

The Referee: And it can be reported with a notation that the testimony has been taken in camera, with the consent of both parties, and with the suggestion on the part of the Referee that it be continued to be held confidential.

Mr. Sheridan: Yes. I have tried to explain that to this witness, but he told me no later than yesterday afternoon, in the presence of his lawyer, and again this morning; and I am in this unfortunate position: My client would like to have a full and complete story, [fol. 556] the good if there is any, rather than merely the seamy side of this man's life.

Mr. Wolf: May I make a statement, your Honor?

The Referee: Yes, very briefly.

Mr. Wolf: Very good. I was present in Senator Sheridan's office with the witness a few days ago, when the Senator questioned him regarding persons with whom he was acquainted and particularly fine, decent people. The witness told Senator Sheridan in my presence that he would not discuss the question with him, that he anticipated that his own name would be besmirched, and he would not permit the names of those people whom he respected and who respect him to be besmirched with him, and he told the Senator that he would not reveal the names of those people, and the Senator in my presence said that he would not question him about them.

I had the same talk with Mr. Gelb, of the District Attorney's office; I told Mr. Gelb of Mr. Costello's reluctance to name those persons, and Mr. Gelb told me that they would not press the question, that they would not go into that subject. I want to make that statement.

Last evening the witness left the stand, not knowing precisely what had transpired here. When he questioned me I told him that this proceeding was to be conducted in camera this morning. He was very much perturbed, and went with me to Senator Sheridan's office and repeated his position. To him, whether it is in camera or not, he takes the position that he would be revealing names of persons whom he respects and who respect him, and that to do that would be betraying the trust that he feels these people have in him. That [fol. 557] is the position he took. Of course, I feel that it is my duty to explain that to your Honor.

The Referee: Certainly I understand, and of course if the witness does not answer the question, whether he should be pressed will rest with counsel, not with the Referee.

Mr. Wolf: I understand that, your Honor; I understand.

By Mr. Sheridan:

Q. Now will you kindly give us the names of some of the people with whom you have had social and business contact?

A. I refuse to mention any names.

Q. Do you understand, Mr. Witness, that anything you testify here shall never at any time be revealed, and that you are doing it under a court process?

The Referee: Of course, that is a little extreme. We cannot control the Court.

Mr. Sheridan: All right.

The Referee: All that the Referee can do is to make a suggestion.

Mr. Sheridan: All right. Well then, I shall propound questions, the only way that I have.

The Referee: Well, do you propose to use the names yourself in the questions?

Mr. Sheridan: Names that he disclosed to me, at least in my office, last Saturday in the presence of his lawyer.

The Referee: Well, if the witness is not going to [fol. 558] answer, I don't think the names should be introduced by you, because it will not amount to any evidence.

Mr. Sheridan: No. Your Honor, I am in an unfortunate position, I assure you. Here we have a situation where his attorney and this man, in the presence of the District Attorney, off the record discussed these matters; they discussed them in my office, and I thought, as my duty to my client, that if this hearing was in camera, that then the man, knowing that there was the seal of privacy, might give us those names. If he was going to reveal any wrongdoing it would be different, but he takes the attitude that he has never had any wrongdoing with these decent people; that he has been to their homes, they have been to his, and that he has been on terms of intimacy with them. I, however, shall not press it, if your Honor says I am not to ask it.

The Referee: I don't think you should ask, I don't think you should bring the names in yourself.

Mr. Sheridan: Then all right.

The Referee: Is that your view, Mr. District Attorney?

Mr. Hogan: Yes, I certainly do not think the names should be included in a question.

The Referee: I don't think names should be included in the question which the witness will not answer.

Mr. Hogan: I am not suggesting that the Senator should not press the point, but he certainly should not attempt to put in names in that fashion, I think we all agree on that.

[fol. 559] The Referee: Of course, if the witness will answer—I suppose he can be instructed to answer, but I shall not instruct him to answer unless either of the counsel, or at least one of the counsel, requests it.

Mr. Sheridan: I think, your Honor, that—I tried to do it, really, and really I must say I don't know how to proceed.

The Referee: No one is questioning your good faith.

Mr. Sheridan: No. In other words, for me to propound questions which may be objected to as leading and so forth, if the man is not willing to tell; and I tried to do everything in my power to make him disclose the names.

Q. Could you tell us some of the names of these people?

A. No, sir.

Mr. Sheridan: Well then—

The Referee: Well, I suppose that closes this part of the matter.

Mr. Hogan: Senator, will you need this witness again?

Mr. Sheridan: Well, your Honor, may I ask this, that as to what has transpired here nothing should be stated in the press about this man's attitude or his refusal?

The Referee: I don't think anyone knows about it.

Mr. Sheridan: I don't think it should be disclosed by anyone afterward, that this man took this attitude. [fol. 560] The Referee: Well, of course, I cannot make a statement to that effect.

Mr. Sheridan: No, no, but I think your Honor should instruct the parties here.

Mr. Hogan: But your Honor, I don't we should limit the witness in stating that he gave no names, because otherwise the press will say that he gave names.

Mr. Sheridan: Oh, no, no. I think anything that transpired here has got the seal of privacy.

The Referee: Well, if you want it that way.

Mr. Sheridan: In other words, if we are going to state to the press that he took the stand and would not give names and would not do this, then the whole thing is meaningless.

Mr. Hogan: I do not press it one way or the other, Judge. It certainly will not be revealed by me.

(The last page of the transcript of Costello's testimony is not contained in the bound record.)

[fol. 561]

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 59

FRANK COSTELLO, Petitioner;

v.

UNITED STATES OF AMERICA.

STIPULATION AND ADDITION TO RECORD—

Filed August 16, 1960

It is hereby stipulated by and between the parties to the above-captioned case that the printed record before this Court be amended by adding thereto pages 116a through 284a and 285a through 419a of the record filed in this Court by petitioner with his petition for a writ of certiorari in the case of *Costello v. United States*, No. 494, October Term 1957. These pages represent printed copies of Government's Exhibits 3 and 2, respectively, as admitted in evidence in this case by the trial court. Three copies of said record as used by the Court below in this case and certified by the Clerk of said Court are filed herewith.

/s/ Edward Bennett Williams, 1000 Hill Building,
Washington, D. C., Counsel for Petitioner.

/s/ J. Lee Rankin, Solicitor General, Department of
Justice, Washington 25, D. C.

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No.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IN THE
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OCTOBER TERM, 1959

No.

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a decree of denaturalization entered by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court is reported at 171 F. Supp. 10 (R. 17-43). The opinion of the Court of Appeals has not yet been reported (App. 2a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner can be denaturalized for representing that his occupation was "real estate" when he was concededly engaged in the real estate business and the government's inquiry could reasonably be interpreted as calling for no more than his legal occupation.

2. Whether the Court is entitled to draw any inference from petitioner's failure to take the stand in a denaturalization case.

3. Whether due process permits denaturalization where citizenship was granted thirty-three years prior to the institution of suit, the facts alleged as a basis for denaturalization were known to the government thirty-two years prior to the institution of suit, and many material witnesses have become unavailable by reason of death.

4. Whether a decree of denaturalization may rest in part upon evidence tainted by wiretapping.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the

judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively; PROVIDED, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence."

STATEMENT

Petitioner came to the United States from Italy in 1895, when he was four years old. He was admitted to citizenship by the United States District Court for the Southern District of New York in 1925.

This case represents the government's second attempt to revoke petitioner's citizenship. On October 22, 1952, it filed a complaint seeking his denaturalization

under § 338 of the Nationality Act of 1940, 54 Stat. 1158. Pretrial motions to dismiss on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint were denied. 142 F. Supp. 290, 325. On the fourth day of trial, however, Judge Palmieri granted petitioner's motion to dismiss on the ground that both the affidavit of good cause and the government's evidence at trial were extensively tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals reversed, holding that evidence derived from wiretapping by state officers is admissible in the federal courts and alternatively that the trial court should have afforded the government an opportunity to file a new affidavit of good cause and to demonstrate that it had sufficient untainted evidence at trial.¹ 247 F. 2d 384. On April 7, 1958, this Court granted certiorari and reversed with directions to dismiss the complaint, on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint. 356 U.S. 256.

On May 1, 1958, the government filed a new complaint seeking petitioner's denaturalization under § 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260 (R. 3-14). Factually the allegations of this complaint are very similar to the allegations of the prior complaint. It alleged that petitioner procured his citizenship by wilful misrepresentation in that: (a) he stated that his occupation was real estate, whereas in truth and in fact his occupation was the illicit purchase and sale of alcohol; (b) he stated that Harry C. Sausser, one of his naturalization witnesses, was in the real estate business and had personal knowledge of

¹ This opinion was handed down prior to the decision in *Benanti v. United States*, 355 U.S. 96.

his good moral character, whereas in truth and in fact Sausser was engaged with him in the illicit purchase and sale of alcohol; (c) he stated that the only other name he had ever used was Francisco Castiglia, whereas he had also used the names Frank Stello and Frank Saverio; (d) he stated that he would support and defend the Constitution and laws of the United States and that he would bear true faith and allegiance to the same, whereas he was then violating both federal and state laws relating to alcohol and income tax and intended to continue so to do; and (e) he stated that he had never been arrested or convicted whereas he had been arrested four times and convicted of unlawful possession of a firearm. The complaint further alleged that petitioner procured his citizenship by concealment of a material fact, in that he concealed the fact that Sausser was engaged with him in the illicit purchase and sale of alcohol and knew him to be a person of bad moral character.

This case came on for trial before Judge Dawson, who found that the government had sustained its allegations relating to petitioner's occupation and allegiance (allegations (a) and (d) *supra*). Judgment was accordingly entered revoking petitioner's naturalization (R. 43-44). Judge Dawson stated that he was not convinced that any of the government's other allegations had been established by the degree of proof requisite in an action of this nature (R. 29).

Judge Dawson relied heavily upon certain statements made by petitioner to New York state authorities in 1943 to support his finding that petitioner's true occupation at the time of his naturalization was bootlegging (R. 23-25). Judge Palmieri had previously ruled that these statements were extensively infected with wire-

tapping. 145 F. Supp. 892. Judge Dawson, however, reached a contrary conclusion and held that they were admissible (R. 39-42).

The Court of Appeals affirmed on February 17, 1960. It concluded that petitioner was guilty of wilful misrepresentation when he stated that his occupation was "real estate". The opinion concedes, however, that petitioner was associated with a real estate company of which he later became president and that the government's inquiry as to occupation could have been construed as calling for no more than his legal occupation (App. 7a-8a).

The Court of Appeals was not satisfied that petitioner's oath of allegiance sustained a finding of fraud (App. 9a). It expressly declined to pass upon any of the other allegations of the complaint, which were not relied upon by the trial court (App. 6a). Nor did it pass upon the admissibility of petitioner's statements to New York state authorities.

REASONS FOR GRANTING THE WRIT

1. The decision of the courts below is completely inconsistent with this Court's decisions in *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670. In two cases now pending this Court granted certiorari to determine whether the lower courts properly applied the standards laid down in these decisions, and petitioner submits that the same course should be followed here. Cf. *Chaunt v. United States*, No. 593, October Term, 1959, and *Polites v. United States*, No. 631, October Term, 1959.

In the *Nowak* and *Maisenberg* cases, petitioners were asked whether they believed in anarchy or belonged to

any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is presented in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation (App. 7a-8a). The Court of Appeals referred to a real estate transaction which was concluded by the Koslo Realty Corporation in June of 1925, one month after petitioner filed his preliminary form for naturalization and three months before he was formally admitted to citizenship (App. 7a-8a).² The record also contains uncontradicted documentary evidence of two other real estate transactions handled by Koslo Realty Corporation during this period.³

² The record shows that Koslo Realty Corporation purchased certain property in New York City on December 1, 1924, and sold it on June 22, 1925 (R. 206-208, 223-224). A purchase money mortgage in the amount of \$41,230.00 was released on December 21, 1925 (R. 225-226). Petitioner signed this release as president of Koslo Realty Corporation. The government introduced sworn testimony by petitioner to the effect that he realized a profit of \$25,000.00 on this transaction (R. 188-189). This sum was substantially in excess of petitioner's average annual income during the years 1919-1932 (R. 185-189).

³ The record shows that Koslo Realty Corporation purchased three parcels of grounds in the Bronx on August 12, 1925, and sold them to the Rosenblum Realty Corporation on June 22, 1926

The Court of Appeals further found that petitioner could have interpreted the government's inquiry as relating to his legal occupation (App. 8a). Under these circumstances, petitioner could not be guilty of wilful misrepresentation when he answered "real estate".

The contrary conclusion of the court below is inexplicable in the light of *United States v. Profaci*, decided by another panel of the Second Circuit on January 12, 1960. There the defendant stated at the time of his naturalization that he had never been arrested, although he actually had a criminal record in Italy. The Court of Appeals reversed a decree of denaturalization on the ground that he could reasonably have interpreted the government's inquiry as relating solely to arrests in the United States, relying upon the *Nowak* and *Maisenberg* decisions.

Here the Court of Appeals endeavored to support its finding of wilful misrepresentation by stating: "We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but 'dust in the eyes' to conceal his real occupation" (App. 8a). The serious issue presented by this case, how-

(R. 209-212, 231-232). The record further shows that Koslo Realty Corporation purchased several pieces of ground in the Bronx from the Claire Building Corporation on October 26, 1925, giving back purchase money mortgages in the amount of \$70,000 (R. 213-216). On July 15, 1926, Koslo Realty Corporation deeded this land, with the buildings and improvements thereon, to the R.G. & F. Construction Corporation, subject to mortgages aggregating \$310,000 and also subject "to present leasings, lettings and tenancies" (R. 227-230). It is apparent that a large office building or apartment was constructed on this property while it was owned by Koslo Realty Corporation.

ever, cannot be avoided by characterizing petitioner as "worldly-wise" and his real estate activities as "dabbling". If this Court is to give meaning and effect to the *Nowak* and *Maisenberg* decisions, it should review this case to determine whether the decision of the courts below is consistent with them. The grant of certiorari in two somewhat similar cases makes it particularly appropriate to grant certiorari in this case.

2. Petitioner did not elect to take the stand on his own behalf and the government did not call him as a witness. The Court of Appeals concluded that "the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand" (App. 5a). It ruled that petitioner had no privilege to remain silent because he was not a criminal defendant, citing its prior decision in *United States v. Matles*, 247 F. 2d 378, reversed on other grounds, 356 U.S. 256.

The Court of Appeals then proceeded to do what the District Court had not done. It stated that petitioner's failure to produce evidence of other real estate transactions by the Koslo Realty Corporation warranted the inference that there were none such (App. 8a). It went on to state that while an applicant for citizenship might believe he was bound to disclose only his legal occupation, there was no evidence that petitioner so believed (App. 8a). In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

Here again, the Court of Appeals followed a course squarely contrary to the *Nowak* and *Maisenberg* decisions. In *Nowak* the trial court specifically referred to defendant's failure to take the stand in support of its denaturalization decree. 133 F. Supp. 191, 196. This Court, however, refused to infer from Nowak's silence that he must have understood the crucial question as referring to membership in the Communist Party.⁴ Absent any evidence as to how Nowak actually understood the question, this Court resolved the ambiguity in his favor.

The right of a denaturalization defendant to stand silent has been considered in two other cases. In the first denaturalization proceedings against petitioner, he was compelled to take the stand over his objection. Judge Palmieri filed an opinion, however, stating that he was in agreement with petitioner's assertion of privilege under the Fifth Amendment and was overruling it only to provide an adequate record for appellate review. 144 F. Supp. 779.

Likewise, Chief Judge Clark expressed grave doubts in *Matles* as to the propriety of compelling a defendant

⁴ The opinion states, 356 U.S. at 665, footnote 3:

"No evidence was introduced tending to show that Nowak actually understood Question 28 as calling for disclosure of his membership in the Communist Party. The Government argues that the requisite understanding of the question should be imputed to Nowak, 'an important functionary in the Party, and an intelligent man,' because of the fact that for some period prior to 1937 the deportation and exclusion statutes applied to aliens 'who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law'. Act of October 16, 1918, 40 Stat. 1012. The gap in the Government's proof cannot be filled in such tenuous fashion, especially in view of the citizenship provisions of the Nationality Act of 1906 referred to in the text."

to denaturalize himself. He concluded that "this important issue must of course await final settlement by the Supreme Court." 247 F. 2d at 382. This Court, however, did not reach the issue because it ordered dismissal of the proceedings on the ground that the affidavit of good cause had not been timely filed. 356 U.S. 256.

The issue thus left unresolved in *Matles* is again raised in this case. If it was definitively resolved in *Nowak*, this case was wrongly decided. If it was not definitively resolved in *Nowak*, it should be resolved now. In either event this Court should grant certiorari.

3. The Court of Appeals dismissed from consideration the long delay between naturalization and denaturalization in the opening paragraph of its opinion. It pointed out that this is "another of those troublesome denaturalization cases, instituted by the government in an effort to have the court cancel a certificate of naturalization issued over thirty years ago" (App. 3a). It further pointed out, however, that there was no applicable statute of limitations, and it regarded independent consideration of the defense of laches as foreclosed by *United States v. Summerlin*, 310 U.S. 414, 416.

Summerlin, however, was not a denaturalization case. It is well settled that sovereign immunity from laches is based upon public policy and will be recognized only when such immunity serves public policy. *Guaranty Trust Co. v. United States*, 304 U.S. 126. The increasing frequency of attacks upon old certificates of naturalization and the resulting hardship upon naturalized citizens require this Court to determine whether such attacks are consistent with due process.

Here petitioner was admitted to citizenship in the Southern District of New York in 1925. He was indicted in this same district for conspiracy to violate the prohibition laws in 1926. The jury was unable to reach an agreement and subsequently the case was dismissed on motion of the prosecution. Petitioner testified at length before a federal grand jury for this same district in 1939, and there was again evidence of alleged prohibition violations on his part.

Under the applicable statutes, it was the duty of the United States Attorney to institute denaturalization proceedings against petitioner if in fact such conduct constituted "good cause" therefor.⁵ Instead, the United States Attorney waited for twenty-seven years after petitioner's indictment and thirteen years after his grand jury testimony before instituting denaturalization proceedings based upon his alleged prohibition violations. In the meantime, the naturalization examiners who processed petitioner's application, the witnesses who testified on his behalf, and the judge who admitted him to citizenship have all died.

The Court of Appeals recognized the harshness of decreeing denaturalization under these circumstances (App. 3a). Petitioner urges that due process does not permit revocation of citizenship granted more than three decades ago on the basis of alleged misrepresentations known to the government for more than three decades. This Court should grant certiorari to determine this grave question, since the lower federal courts consider it foreclosed by the *Summerlin* decision.

4. Both the trial court and the Court of Appeals relied heavily upon certain statements by petitioner to

⁵ Immigration and Naturalization Act of 1906, § 15, 34 Stat. 601.

support their finding that his true occupation was bootlegging. It is petitioner's position that these statements must be excluded from consideration in determining the sufficiency of the government's proof, because they are extensively infected with wiretapping. In order to determine whether the government's proof complies with the standards laid down in *Nowak* and *Maisenberg*, it may become necessary to resolve the admissibility of this evidence. In order to avoid any possible claim that its admissibility is not fairly comprised within the first question presented by the petition for certiorari, petitioner presents the admissibility of this evidence as a separate question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
VINCENT J. FULLER,
Counsel for Petitioner,

March, 1960.

APPENDIX

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the seventeenth day of February, one thousand nine hundred and sixty.

Present:

HON. CALVERT MAGRUDER,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

FRANK COSTELLO, *Defendant-Appellant*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 58—October Term, 1959.

(Argued November 17, 1959 Decided February 17, 1960.)

Docket No. 25690

UNITED STATES OF AMERICA, *Appellee*,

—v.—

FRANK COSTELLO, *Appellant*.

Before: MAGRUDER, MOORE and FRIENDLY, *Circuit Judges*.

Appeal from a decree of the United States District Court for the Southern District of New York, Archie Owen Dawson, *Judge*, revoking citizenship, pursuant to Section 340(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1451(a), as amended, 68 Stat. 1232, on the ground that citizenship certificate was obtained willful misrepresentations. 171 F. Supp. 10. *Affirmed*.

EDWARD BENNETT WILLIAMS, Washington, D. C. (Agnes A. Neill and Vincent J. Fuller, Washington, D. C., Morris Shilensky, New York, N. Y., and Hays, St. John, Abramson & Heilbron, New York, N. Y., on the brief), *for appellant*.

MORTON S. ROBSON, Asst. U. S. Atty., Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Atty., S. D. N. Y., New York, N. Y., on the brief), *for appellee*.

MAGRUDER, *Circuit Judge*:

This is another of those troublesome denaturalization cases, instituted by the government in an effort to have the court cancel a certificate of naturalization issued over thirty years ago. The proceeding is brought pursuant to § 340(a) of the Immigration and Nationality Act of 1952, as amended, 68 Stat. 1232. This statute contains no provision for limitations, nor is there any other federal statute applicable to the case. And, as Hughes, *C.J.*, said in *United States v. Summerlin*, 310 U. S. 414, 416 (1940): "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."

It is impossible to say that the statutory provisions for the issuance by the court of naturalization certificates, under certain prescribed conditions, do not constitute a proper judicial function. *Tutun v. United States*, 270 U. S. 568 (1926). And despite what may seem to be the harshness of the result, it seems impossible to say that the Congress cannot constitutionally provide a proceeding for the cancellation of a certificate obtained by fraud or concealment. *Knauer v. United States*, 328 U. S. 654, 673 (1946). It was so provided way back in the Act of 1906 which, in § 15 thereof, vested jurisdiction in the district courts of suits by the United States Attorney on behalf of the United States "for the purpose of setting aside and canceling a certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." 34 Stat. 601. See *Johannessen v. United States*, 225 U. S. 227 (1912). Such provision for denaturalization was carried forward by Congress into § 338(a) of the Nationality Act of 1940 (54 Stat. 1158-59). In the Immigration and Nationality Act passed in 1952, denaturalization proceedings were also provided for, but the Congress struck out the earlier provision for cancellation of a certificate that had been illegally issued, and confined cancellation to cases where the certificate had been procured "by

concealment of a material fact or by willful misrepresentation." 66 Stat. 260. This provision was reenacted by the Congress in 1954. 68 Stat. 1232.

The Supreme Court has never told us that a denaturalization proceeding partakes of the character of a criminal proceeding. Indeed, in the *Johannessen* case, *supra*, the Court upheld the constitutional validity of a provision in § 15 of the Act of 1906 to the effect that the denaturalization provisions should apply not only prospectively but also "to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws." 34 Stat. 601. In this connection the Court said (225 U. S. at 242): "It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description. . . . The act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."

Although the Supreme Court has many times upheld a decree for the cancellation of a certificate of naturalization, it has prescribed an exacting quantum of proof as requisite to establishing a case by the government against a certificate holder. The case for cancellation must be "clear, unequivocal, and convincing," and should not leave "the issue in doubt." See *Schneiderman v. United States*, 320 U. S. 118, 158 (1943); *Baumgartner v. United States*, 322 U. S. 665 (1944); *Knauer v. United States*, *supra*, 328 U. S. 654 (1946).

If a denaturalization case is a sort of civil proceeding, we are at a loss to see why our scope of review is not limited by the "clearly erroneous" test of the unqualified Rule 52(a) of the Federal Rules of Civil Procedure. If that is so, then once we are convinced that the district court was aware of and applied the proper strict standards of proof—which clearly appears in the case at bar—we ought not to upset

its finding that the defendant had obtained his certificate of citizenship by fraud unless we are satisfied that such finding was "clearly erroneous." See *Corrado v. United States*, 227 F. 2d 780, 783 (C. A. 6th, 1955). Of course, fraud is an internal state of mind, and it is possible that a man may give an incorrect answer to a question in a bona fide but mistaken belief as to what the question calls for. But if an applicant for citizenship has in fact no such misapprehension as to what answer the question calls for, and consciously falsifies an answer on a material point, he is certainly guilty of fraud in the baldest sense of the term. The district court believed that Costello was guilty of this kind of fraud, and we certainly cannot say that the finding to this effect was "clearly erroneous."

On the other hand, perhaps we are wrong about our limited scope of review; and it may be that in this very special type of civil proceeding we have a broader power of review, and are under the obligation ourselves to scrutinize the evidence, to satisfy ourselves that the proof offered by the government was "clear, unequivocal, and convincing." See *Baumgartner v. United States*, *supra*, 322 U. S. 665, 670-72 (1944); *Brenci v. United States*, 175 F. 2d 90 (C. A. 1st, 1949); *Cufari v. United States*, 217 F. 2d 404 (C. A. 1st, 1954).

Fortunately, we do not in this case have to determine what our scope of review may be in these cases since we are here more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof. 171 F. Supp. 10.

We think the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand and to introduce no evidence in answer to the government's case indicating fraud. The matters inquired into were within Costello's peculiar knowl-

edge. Since Costello was not a criminal defendant in the present proceedings, he had no privilege to remain silent. *United States v. Matles*, 247 F. 2d 378 (C. A. 2d, 1957), rev'd on other grounds 356 U. S. 256 (1958). See also *Vajtauer v. Commissioner*, 273 U.S. 103 (1927).

The government's complaint in the present case was filed May 1, 1958. In compliance with the procedural requirement of § 340(a), as amended, the complaint was accompanied by affidavits showing "good cause" for the institution of the proceeding. 68 Stat. 1232. The request for cancellation of the certificate of naturalization was based upon various allegations of fraud and concealment. We mean to be guided by the words of the Supreme Court in the *Schneiderman* case, *supra*, 320 U. S. at 160: "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently we think the Government should be limited, as in a criminal proceeding, to the matters charged in its complaint."

Some of the allegations of fact contained in the complaint were not accepted by the district court as sufficiently established pursuant to the strict requirements of proof imposed upon the government. Though the government now urges us to examine the state of the evidence in these regards, we do not propose to go beyond the findings of fact by the district court. That court based its decree upon findings with reference to two of the issues raised by the complaint: (1) That in the preliminary form for petition for naturalization, and in testimony under oath before a naturalization examiner, and also in his petition for naturalization, Costello knowingly and willfully stated that his occupation was "real estate," whereas in truth his occupation was the illicit purchase and sale of alcoholic beverages; (2) that the defendant swore in his oath of allegiance, on September 10, 1925, that "I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance

to the same." This was said to be a known falsehood because the defendant was actually engaged at the time in a course of activity which flouted the Constitution and was designed to violate the laws of the United States.

It was established by the United States, from Costello's own mouth, that he was at the crucial dates engaged in bootlegging activities. He gave a statement to Special Agent Sullivan on July 24, 1938, to the effect that he was involved in the liquor business from 1923 or 1924 until a year or two before repeal of the Eighteenth Amendment. In answer to questions by the district attorney in a proceeding before a New York County grand jury in 1943, Costello admitted that he got large sums of money from importing whisky during prohibition days. He admitted that he had reported to the state taxing authorities that for the years 1919 to 1932 his income had totaled \$305,000, most of it made in the bootlegging business. If corroboration of these statements is required in the present case, such corroboration is amply found in the testimony of the witnesses Kessler, Kelly and Coffey. The evidence is clear beyond any doubt that during prohibition days Costello's major activity, both in terms of time spent and revenue obtained, was bootlegging.

In his preliminary form for petition for naturalization, in answer to a question requiring him to put down his "present occupation," he answered "real estate." He gave a similar answer in his petition for naturalization.

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. The government made a check of the real estate records in four counties of Greater New York, which check revealed that Koslo Realty Co., Inc., was organized on December 1, 1924; that some time prior to May 1, 1925, Costello was associated with this corporation. Koslo Realty Co. purchased a piece of property and sold the same on June 22,

1925. Costello later became president of the corporation. How much activity Costello had to expend in this capacity does not appear, nor does it appear whether or not Koslo Realty Co. was engaged in other real estate transactions in other parts of the country not covered by the government's spot check. If there was any further evidence along this line, it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. As the district judge stated: "If a man in that situation had been honest when asked what his occupation was, would he have answered 'real estate'? If he had told the truth he probably would not have been naturalized, but this is no excuse for his using fraud and deceit to secure his naturalization." The term "occupation," the court said, "would commonly be understood to refer to income producing activity to which a person devotes the major portion of his time and from which he derives the greater portion of his income." 171 F. Supp. at 18. Surely it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some "legal occupation." There is no evidence in the record that Costello so believed. If he had given a truthful answer, it is probable that the court would not readily have accepted his assertion of being possessed of "good moral character," and he might not have received his certificate of naturalization. As the district court said: "When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaged in a willful misrepresentation in order to secure his naturalization certificate." 171 F. Supp. at 18.

The district court also based its holding upon a finding that Costello falsely swore that he would "support and

defend the Constitution" and "bear true faith and allegiance to the same."

Costello also swore that he was "attached to the principles of the Constitution." Just what this phrase might mean as used in the Nationality Act poses a question of some difficulty. See *Stasiukerich v. Nicolls*, 168 F. 2d 474, 477 (C. A. 1st, 1948). We don't believe that the phrase would require a person to believe in the soundness of the Eighteenth Amendment; but at least it would seem to require that the applicant should support an existing provision of the Constitution unless and until it is repealed in an orderly way as provided in Art. V of the Constitution. Therefore, if Costello was at the time engaged in violation of the Eighteenth Amendment and of the Volstead Law, it seems hard to say that he was "attached to the principles of the Constitution."

But the answer to all the foregoing is that the complaint in the present case does not charge that Costello swore falsely in affirming that he was "attached to the principles of the Constitution."

We are not satisfied that the district court was correct in ruling that the oath to "support and defend the Constitution and laws of the United States" means the same as "attached to the principles of the Constitution." It may be urged that the oath which Costello was charged with having violated was merely a political oath calling for a repudiation of allegiance to King Victor Emmanuel III and a statement of allegiance to the United States. We do not have to pass finally on this alleged fraud in the oath, since the first allegation, with reference to the statement of Costello's occupation, is amply supported so as to sustain the charge of fraud and to require us to uphold the decree of denaturalization.

There is only one further point made by appellant that deserves some extended comment. It has to do with the validity of the affirmative defense, specifically pleaded here, that "the complaint is barred under principles of

res judicata." We think there is nothing to the point; in fact, we cannot see how any court could accept the argument advanced by appellant except upon an invincible determination to frustrate finally what the court might regard as an undesirable effort by the government to accomplish the cancellation of an old certificate of naturalization.

This is not the first effort by the government to obtain the cancellation of Costello's certificate. On October 22, 1952, the district attorney filed a denaturalization complaint against Costello under § 338 of the Nationality Act of 1940 (54 Stat. 1158). The allegations of fraud were about the same as in the present complaint. But as then permitted by law, cancellation of the certificate of naturalization was also sought on the ground that the certificate was "illegally procured"; that is to say, that the conditions precedent to naturalization, a "good moral character" and an attachment "to the principles of the Constitution," did not in fact exist. As we have previously stated, the latter ground of cancellation was omitted from the present Act.

Though the United States Attorney filed an affidavit of "good cause" prior to the trial of that earlier action, he failed to submit this affidavit simultaneously with the filing of the complaint. The district court entered an order dismissing the complaint "without prejudice." 145 F. Supp. 892 (S. D. N. Y. 1956). The court of appeals reversed, in an opinion having to do solely with so-called "wire tap" evidence. *United States v. Costello*, 247 F. 2d 384 (C. A. 2d, 1957). Upon certiorari the Supreme Court, in a one-paragraph *per curiam* opinion, reversed the judgment of the court of appeals upon a ground not theretofore considered by that court, namely, that an affidavit showing good cause is a prerequisite to the initiation of denaturalization proceedings and must be filed along with the complaint when the proceedings are instituted, citing only *United States v. Zucca*, 351 U. S. 91 (1956). Accordingly the Supreme Court remanded the case to the district court with directions to dismiss the complaint. 356 U. S. 256 (1958).

When the case got back to the district court, since nothing was said in the Supreme Court mandate about whether the dismissal should be with or without prejudice, the district judge considered that he was bound by the terms of the mandate merely to dismiss the complaint.

There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In Rule 41(b) of the Federal Rules of Civil Procedure it is provided as follows: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Rule 41(b) does not state what the effect of a prior judgment on the merits is, but if the dismissal of the earlier complaint was really a judgment on the merits we suppose that that would preclude the government as well as a private litigant from filing another complaint based upon the same cause of action, under principles of *res judicata*.

The district court was persuaded by the government's argument that Rule 41(b) had no application because the dismissal was "for lack of jurisdiction" within the meaning of the rule.

No doubt the word "jurisdiction" is a somewhat slippery one, susceptible of various meanings. In holding, as we do, that Rule 41(b) has no application, we prefer not to say that the district court lacked "jurisdiction" to determine the denaturalization complaint despite the lack of a "procedural prerequisite," namely, the filing of an affidavit showing "good cause" simultaneously with the filing of the complaint. Because the phrase "lack of jurisdiction" is used in immediate conjunction with the phrase "for im-

proper venue," it would be plausible to argue that the word "jurisdiction" is used in the rule in its usual restricted sense. See *Title v. United States*, 263 F. 2d 28 (C. A. 9th, 1959).

In striking out the words "without prejudice," as proposed by the government, the district court exercised no discretion, as contemplated in the rule, but merely conceived that it was bound by the mandate of the Supreme Court to dismiss the complaint without saying anything about whether it should be with or without prejudice.

The district court did not determine that its dismissal should be regarded as a judgment on the merits. It made no findings as provided in the sentence of Rule 41(b) saying that, "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." And it is obvious that the Supreme Court, in directing such dismissal, did not suppose that it was directing a determination on the merits, which would preclude the government from starting over again, with this particular statutory "procedural prerequisite" duly observed. In the only case cited by the Supreme Court in its brief *per curiam* opinion, *United States v. Zucca*, *supra*, 351 U. S. 91 (1956), the district court had dismissed a complaint for denaturalization, without prejudice to the government's right to institute an action to denaturalize the respondent upon filing an affidavit of good cause. 125 F. Supp. 551 (S. D. N. Y. 1954). The court of appeals affirmed the dismissal (221 F. 2d 805 (C. A. 2d, 1955)) and upon certiorari the Supreme Court in its turn affirmed the judgment of the court of appeals. 351 U. S. 91 (1956). The Supreme Court thought that the district court had correctly dismissed the proceedings because of the failure of the government to file the required affidavit at the time the complaint was filed. But note, that such dismissal had been without prejudice.

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising

some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. And see Restatement, Judgments § 49 (1942).

A judgment will be entered affirming the judgment of the district court.

FILE COPY

MOTION FILED APR 1 1960

No. 207 59

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1959

FRANK COSTELLO, *Petitioner,*

v.

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit**

**MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT
OF CERTIORARI AND AMENDMENT TO PETITION**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 802

FRANK COSTELLO, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Second Circuit

**MOTION FOR LEAVE TO AMEND PETITION FOR
CERTIORARI**

Petitioner respectfully moves this Court for leave to amend the petition for certiorari filed herein on March 18, 1960, on the following grounds:

1. The Solicitor General filed a petition for certiorari in the case of *United States v. Lucchese*, No. 789, on March 14, 1960. This petition recites that denaturalization proceedings against Lucchese were dismissed "without prejudice" because the government had failed to file an affidavit of good cause contemporaneously with the complaint. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court, which ordered the case "remanded to

the District Court with directions to dismiss" the complaint. 356 U.S. 256.

2. Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government moved for resettlement of the dismissal order. When this motion was denied, the government appealed. On October 15, 1959, the Court of Appeals for the Second Circuit dismissed the government's appeal. The government obtained an extension of time for filing a petition for a writ of certiorari to and including March 14, 1960.

3. Prior denaturalization proceedings against petitioner Costello were dismissed "without prejudice" because the government's evidence and affidavit of good cause were tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court because the affidavit of good cause had not been filed contemporaneously with the complaint. 356 U.S. 256. This case and the *Lucchese* case were companion cases, reversed with identical directions. Here, as in the *Lucchese* case, the District Court felt constrained to enter an order of dismissal which did not specify whether it was with or without prejudice.

4. Instead of taking an appeal, however, the government filed a new complaint seeking petitioner Costello's denaturalization on grounds similar to but narrower than those alleged in the original complaint. Petitioner took the position that these proceedings were barred by principles of *res judicata*. He relied upon Rule 41(b) of the Federal Rules of Civil Procedure, which provides that any involuntary dismissal "other than a

dismissal for lack of jurisdiction or for improper venue" operates as an adjudication on the merits unless the order otherwise specifies. This position was rejected by the District Court, which entered a judgment revoking petitioner's naturalization. The Court of Appeals affirmed on February 17, 1960.

5. The Solicitor General's petition in the *Lucchese* case asks this Court to grant certiorari in the event that it grants certiorari as to the *res judicata* issue in the *Costello* case. This petition, however, did not come to the attention of counsel for petitioner Costello until March 29, 1960. The *Costello* petition was filed on March 18, 1960, and did not raise the *res judicata* issue.

6. The *Lucchese* petition indicates that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court. Since the petition in the instant case was not due until May 17, 1960, there can be no jurisdictional problem in permitting amendment by adding an additional question at this time. Petitioner believes that it would be in the interest of justice to permit amendment of his petition by adding the matter attached as an appendix to this motion.

WHEREFORE, it is respectfully submitted that the present motion for leave to amend the petition for a writ of certiorari should be granted.

EDWARD BENNETT WILLIAMS,
MORRIS SHILENSKY,
AGNES A. NEILL,
VINCENT J. FULLER,
Counsel for Petitioner.

April, 1960.

APPENDIX

APPENDIX

QUESTIONS PRESENTED

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5. Whether the present proceedings are barred by entry of an order dismissing prior denaturalization proceedings against petitioner, which was entered pursuant to the mandate of this Court and which did not specify whether it was with or without prejudice.

.

REASONS FOR GRANTING THE WRIT

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5. In dismissing prior denaturalization proceedings against petitioner, Judge Palmieri expressly provided that the case was dismissed "without prejudice to the government's initiating it anew on the very same grounds." 145 F. Supp. at 897. The Court of Appeals reversed but was in turn reversed by this Court, which held that an affidavit of good cause is a prerequisite to the initiation of denaturalization proceedings and that the affidavit must be filed with the complaint. This Court remanded the case to the District Court with directions "to dismiss the complaint." 356 U.S. 256.

Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government presented a proposed order for dismissal "without prejudice," but it took no appeal from the court's refusal to sign this order. Instead, the government filed a new complaint against petitioner, which contained allegations very similar to the allegations of the original complaint.

Petitioner urged that these proceedings were barred by principles of *res judicata*. He relied upon Rule 41(b) of the Federal Rules of Civil Procedure, which provides that any involuntary dismissal "other than a dismissal for lack of jurisdiction or for improper venue" operates as

an adjudication on the merits unless the order otherwise specifies. The District Court rejected this contention, on the ground that the prior proceedings had been dismissed for failure to comply with "a jurisdictional requirement" (R. 34).

The Court of Appeals likewise rejected this contention, but on somewhat different grounds. It refused to hold that the District Court lacked jurisdiction in the first proceedings (App. 11a-12a). Instead it concluded that Rule 41(b) does not apply to dismissals entered pursuant to the mandate of an appellate court (App. 12a-13a).

On March 14, 1960, the Solicitor General filed a petition for certiorari in the case of *United States v. Lucchese*, No. 789. The District Court dismissed a complaint seeking Lucchese's denaturalization because the affidavit of good cause had not been filed contemporaneously with the complaint. The Court of Appeals for the Second Circuit reversed but was in turn reversed by this Court. 356 U.S. 256. The *Costello* case and the *Lucchese* case were companion cases, reversed with identical directions. Just as in *Costello*, the District Court in the *Lucchese* case felt constrained to enter an order of dismissal which did not specify whether it was with or without prejudice.

In the *Lucchese* case, however, the government took an appeal which was dismissed *per curiam* on October 15, 1959. The government obtained an extension of the time for filing a petition for certiorari to and including March 14, 1960. On this date the Solicitor General filed a petition asking that a writ of certiorari issue in the *Lucchese* case if this Court should grant certiorari as to the *res judicata* issue in the *Costello* case.

The Solicitor General's petition demonstrates that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions in the field of federal civil procedure. It is apparent that these questions should be resolved by this Court.

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JAMES R. BROWNING, Clerk

No. 202 59

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 802

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2a-13a) is not yet reported. The opinion of the District Court (R. 17-43)¹ is reported at 171 F. Supp. 10.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (Pet. 1a). The petition for a writ of certiorari was filed on March 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ The reference "R" is to petitioner's appendix in the court of appeals, which constitutes the record before this Court.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to establish that petitioner wilfully and falsely misrepresented a material fact during his naturalization proceedings.

2. Whether the government should have been barred from instituting this denaturalization proceeding by the lapse of time since naturalization.

3. Whether some of petitioner's admissions as to his true occupation at the time of naturalization were tainted by wiretapping.

STATUTE INVOLVED

8 U.S.C. 1451(a) (Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 68 Stat. 1232) provides, in part, as follows:

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

STATEMENT

On May 1, 1958, the United States filed a denaturalization complaint (together with affidavits of good cause) against petitioner in the United States District Court for the Southern District of New York (R. 3-14). Following trial without a jury, the District Court vacated the court order admitting petitioner to citizenship and cancelled the certificate of naturalization issued pursuant thereto (R. 17-44). On appeal, the Court of Appeals affirmed.²

1. The government's complaint alleged that the order admitting petitioner to citizenship in May 1925 and the certificate of naturalization had been "procured by the concealment of material facts and by wilful misrepresentation." Specifically, the complaint alleged that petitioner had sworn on three separate occasions (in his preliminary form for petition for

² The government had filed an earlier denaturalization complaint against petitioner on October 22, 1952, under 8 U.S.C. (1946 ed.) 738(a), the predecessor to the statute upon which this proceeding is founded. The District Court granted petitioner's motion to dismiss the earlier complaint and to strike the affidavit of good cause, without prejudice to a renewal of the proceedings, on the ground that both the government's affidavit of good cause (which was filed somewhat after the complaint was filed) and its evidence were seriously tainted by wiretapping. *United States v. Costello*, 145 F. Supp. 892 (S.D. N.Y.). On appeal, the Court of Appeals reversed, holding that the government should have been given an opportunity to establish that its evidence was untainted or otherwise admissible. *United States v. Costello*, 247 F. 2d 384 (C.A. 2). This Court granted the petition for a writ of certiorari and reversed, *per curiam*, on a ground not considered below—that the filing of the affidavit of good cause contemporaneously with the denaturalization complaint was a prerequisite to the institution of the suit. *Costello v. United States*, 356 U.S. 256 (No. 494, O.T. 1957); see *Matles v. United States*, 356 U.S. 256.

naturalization, during his oral testimony before a naturalization examiner; and in his petition for naturalization) that his occupation was "real estate," whereas his actual occupation was the illicit purchase and sale of alcohol (R. 4-5); and that petitioner, in his petition for naturalization, had sworn that he would support and defend the Constitution and laws of the United States, whereas he was at that very time violating the laws of the United States by engaging in the illicit purchase and sale of alcohol (R. 5).

The evidence showed that during the period 1921-1923 petitioner worked for Emanuel Kessler who, until he received a 2-year sentence for violation of the National Prohibition Act, was engaged in the illegal importation of alcoholic beverages from Europe (R. 59-61). Kessler's boats would land about 500 cases of illicit liquor, each night, somewhere on Long Island, New York (R. 60-61). Petitioner and his brother, Edward Costello, were employed by Kessler to meet the boats and truck the liquor to hiding places for storage—either in a garage behind Edward Costello's home, or in an old mansion which petitioner and his brother had purchased (R. 62-65, see 71, 74, 76). Kessler would contact petitioner or Edward daily at their office, 405 Lexington Avenue, New York City, to arrange a meeting place for each night's activity (R. 52-56, 62-63, 76). The Costellos received about \$6,000 each week from Kessler for their hauling and storage service (R. 65, 76-77). When Kessler left for jail in 1923, petitioner asked him "for some money so he could continue on." Kessler gave petitioner "either 100 or 200 cases" of liquor for that purpose (R. 68, 73).

During the period prior to December 1923, petitioner and his brother also stored liquor for Albert Feldman and bought and sold illegal liquor on their own account (R. 168-174). Occasionally petitioner would accept small lots of merchandise from Kessler in partial payment of the storage charges (R. 66). He disposed of 500 cases of liquor supposedly being stored for Kessler (R. 66-67, 175-176), and he somehow reacquired from the government about \$250,000 worth of Kessler's whiskey seized in a raid on petitioner's mansion-warehouse (R. 67-68).

In the fall of 1925, petitioner and Mr. Harry Sausser (one of petitioner's character witnesses in his naturalization proceeding, see Govt. Exs. 7, 9, R. 201, 204) went to Frank Kelly, who was engaged in the importation of illegal liquor, and arranged to have several thousand cases of liquor transferred from a ship at sea to Kelly's vessel, an ocean-going schooner which was laying 100 miles off Long Island (R. 81-86, 93). The plan was to land the liquor in smaller boats at a later time (R. 85-87). In December 1925, petitioner and Kelly arranged to have one Coffey land the liquor stored on board Kelly's schooner (R. 152). Coffey was paid by petitioner's bookkeeper (R. 155, 162).

Late in 1924 or early in 1925, Sausser became associated with petitioner, an association which continued until Sausser's death in 1926 (R. 113-116, 123). Sometimes alcohol was stored on Sausser's premises (R. 118-119), and petitioner and Sausser were sometimes heard to discuss the business aspects of "bootlegging," such as the type of whiskey to be purchased and the price to be paid (R. 120). Sausser's daughter (Miss Helen

Sausser) visited the Lexington Avenue office used by petitioner and her father on three or four occasions. Although "supposedly a real estate office," this location was actually the base of operations for their dealings in illicit alcohol (R. 116-117, 123, 131-134).

On July 20, 1938, in a statement given to James M. Sullivan, Special Agent of the Treasury Department, petitioner stated that he had been in the liquor business "from 1923 or 1924 until about a year or two before Repeal." (R. 177-178).

In testimony before a federal grand jury on August 24, 1939, petitioner admitted that he had done "a little bootlegging," the last time around 1926 (R. 179-180).

In 1943, in testimony before a New York state grand jury and before a referee appointed by the Appellate Division of the Supreme Court of New York, petitioner stated that he smuggled illegal alcohol into this country during prohibition and received large sums of money from this activity (R. 184-185). During the period 1919 to 1932, petitioner earned \$305,000, and most of this income came from his illicit alcohol traffic (R. 187-188, 190-191). Petitioner made about \$20,000-25,000 in one real estate transaction during this time, using funds derived from "gambling or liquor" to finance the operation (R. 188-189).³

³ Pursuant to the order of a New York state court, petitioner's telephone communications were intercepted during the period May 7, 1943 to November 1943. The grand jury interrogation was precipitated by a conversation between petitioner and a New York state judge (R. 47, 49-51). However, no information relating to petitioner's activities before 1930 was derived from these wiretaps (R. 46) and none of the interrogation regarding pre-1930 activity was based on or derived from wiretapping (R. 47-48). Petitioner was interrogated regarding his pre-1930 pursuits solely for the purpose of background (R. 51).

On February 15, 1947, while testifying before the New York State Liquor Authority, petitioner stated that he engaged in bootlegging from 1923 to 1926 or 1927, that his headquarters was at 405 Lexington Avenue, and that his Canadian representative was Harry Sausser (R. 194-196).

A search of the records of the boroughs of Manhattan, Brooklyn, Queens, and the Bronx revealed that petitioner purchased a piece of property in 1922 and conveyed it to "Loretta B. Costello" in 1923. (R. 94-95). In 1924, the Koslo Realty Corporation purchased property in New York City and sold it on June 23 1925 (R. 95, 99).⁴ A purchase money mortgage on this property was released on December 21, 1925, and petitioner signed the release as president of the Koslo Realty Corporation (Govt. Ex. 25, R. 225-226). The Koslo corporation also purchased several lots in the Bronx on August 12, 1925 (Govt. Exs. 19, 20, R. 209-212) and sold them on June 22, 1926 (Def. Ex. C, R. 231-232); purchased land in the Bronx from the Claire Building Corporation on October 26, 1925 (Govt. Exs. 21, 22, R. 213-216), and sold it to the R. G. & F. Corporation on July 15, 1926 (Def. Exs. A, B, R. 227-230). These latter transactions, however, were initiated several months after petitioner filed his petition for naturalization (see *supra*, p. 3).

2. The District Court found that the evidence was "clear, unequivocal and convincing" that petitioner had procured his order of naturalization by wilful mis-

⁴ Apparently this is the transaction referred to by petitioner when he testified before the New York grand jury in 1943 (R. 95, 188, Govt. Ex. 18, R. 208).

representation of material facts and by fraud, in that petitioner had stated his occupation was real estate, whereas his true occupation was "bootlegging", and that petitioner in his oath of allegiance swore to support and defend the Constitution and laws of the United States, whereas at the time he was actually engaged in violating the Constitution and laws of this country (R. 21-22, see 33). The District Court summarized much of the evidence set forth above to support its conclusion (R. 23-26), and it noted that "[i]f the Government rested on the testimony of the individual witnesses it might be necessary to appraise their evidence more carefully, but in view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto he was engaged in bootlegging, the testimony of the individual witnesses is, if anything, merely cumulative." (R. 26).

With specific reference to the question of whether petitioner was actually occupied in real estate, or could reasonably think that such an answer was an honest answer to the question asked regarding occupation, the District Court pointed out (R. 27) that

prior to the time that Costello had sworn that his occupation was "real estate" he personally had engaged in only one real estate transfer in his own name; and the [Koslo] corporation in which he was a principal engaged in only one transaction and that to the extent of purchasing one parcel of real estate. During the same period, * * * he was actively engaged in bootlegging on a large scale and with very profitable results. * * * The

term "occupation" would commonly be understood to refer to the income producing activity to which a person devotes the major portion of his time and from which he derives the major portion of his income. * * * Obviously if he were engaged in an illegal occupation the Government would like to know that to determine whether he properly should be admitted to citizenship. Costello, confronted with the question and the fact that his occupation was an illegal one, had one of two choices in giving his answer. If he had told the truth he would have said that his occupation was bootlegging; his application for citizenship would then have been denied.⁵ When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaging in a willful misrepresentation in order to secure his naturalization certificate.

The trial judge rejected petitioner's contention that his statements as to his prior occupation as a dealer in illicit alcohol were tainted by wiretapping. He noted that there was clear evidence showing that the government did not learn anything regarding petitioner's activities in violation of the prohibition laws from or as a result of wiretapping. Although state officers intercepted petitioner's telephone communica-

⁵ On the question of the materiality of the misrepresentation, the District Court elsewhere noted (R. 22-23) that the judge who admitted petitioner to citizenship in 1925 had, in 1926, denaturalized a person who, during the five years preceding his naturalization, had been convicted of violating the prohibition laws. See *United States v. Mirsky*, 17 F. 2d 275 (S.D. N.Y.).

tions in 1943, and the New York grand jury investigation was precipitated by what was thus learned, petitioner's testimony as to his bootlegging activities was elicited for the purposes of background only and was collateral to the purposes of the investigation (R. 39-42). The trial judge concluded that "[t]he evidence received in this case was not wiretap evidence nor was it the fruit of wiretap evidence." (R. 42).

3. The Court of Appeals put aside the District Court's second ground for decision—that petitioner falsely swore that he would support and defend the Constitution and laws of the United States—without finally passing on it, holding that the charge of wilful misrepresentation and fraud was amply supported by the evidence of petitioner's false statements regarding his occupation (Pet. 8a-9a). It said (Pet. 7a-8a):

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty. * * * If there was any further evidence along this line [as to real estate transactions], it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a wordly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. * * * Surely it is conceivable that an applicant might believe that the answer called

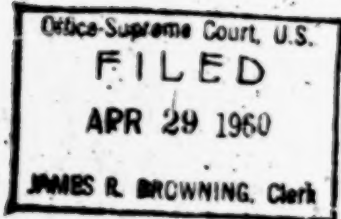
for no more than a disclosure of some "legal occupation". There is no evidence in the record that Costello so believed. * * *

ARGUMENT

1. (a) When petitioner filled out his preliminary form for petition for naturalization, one of the questions which had to be completed was "My present occupation is ———." Petitioner inserted the words "Real Estate" (Govt. Ex. 7, R. 200). When examined under oath by the naturalization examiner, petitioner stated that his business was "Real Estate" (Govt. Ex. 8, R. 202). And on May 1, 1925, when he submitted his petition for naturalization, petitioner answered the second question as follows, "My occupation is *Real Estate*" (Govt. Ex. 9, R. 204). There was nothing vague, complicated or confusing about these questions regarding petitioner's business or occupation. They simply asked petitioner to describe, as the District Court put it, the "income producing activity to which" petitioner "devote[d] the major portion of his time and from which he derive[d] the major portion of his income." (R. 27). And the answers which petitioner gave were, as both lower courts found, shown by clear, unequivocal, and convincing evidence to have been false.

According to his own sworn statement, petitioner earned \$305,000 during the period 1919-1932, an average of over \$23,000 each year. Almost all of this came from his illegal traffic in alcohol. There was other evidence that petitioner and his brother grossed as much as \$6,000 each week in 1922-1923 from their criminal activities. As opposed to that, there was evidence that petitioner purchased one piece of property in his own

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No. 202 59

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF
HABEAS CORPUS**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

name in 1922, and that a corporation in which petitioner had some interest purchased certain property late in 1924. As of May 1, 1925, the date of petitioner's petition for naturalization, that property had not been sold, and the \$20,000-\$25,000 which petitioner later received as profit from the sale was as yet unrealized. Moreover, the very money which petitioner put into the latter real estate purchase was derived from his liquor and gambling activities. The lower courts thus had every reason to conclude that petitioner's sporadic real estate ventures were not really his occupation, and that he was actually in the business of violating the prohibition laws.

(b) The lower courts were also fully justified in concluding that petitioner's claim that his occupation was "real estate" was a knowing falsification. It is inherently unreasonable that a person would regard a business (real estate) from which he has not derived any money as his occupation, when at the same time he was deriving large sums of money from his illicit actions and had commercialized those actions to the point of maintaining an office, employing a bookkeeper assistant, and purchasing trucks for the specific purpose of advancing his liquor dealings.

Moreover, petitioner, in his preliminary form for petition for naturalization and during his examination under oath, named Harry C. Sausser as one of his expected witnesses, and listed Sausser's occupation as "Real Estate" (Govt. Exs. 7, 8, R. 201, 202). As a matter of fact, however, according to petitioner's later sworn statement, Sausser was petitioner's Canadian representative in the purchase of alcoholic beverages

which were later illegally imported into the United States. Petitioner thus must have known that his statement as to Sausser's occupation was false, and that his statement as to his own occupation was no less so.

Petitioner's contention that he might have interpreted the question as to occupation to refer only to his legal occupation (Pet. 6-9) is not well-founded. The question itself was straightforward—it asked for a disclosure of petitioner's "occupation", not his "legal occupation". In pre-naturalization proceedings, where the applicant's good character is an issue, the government is interested in a disclosure of the applicant's real business, whether or not it is a legal line of endeavor. Petitioner argues his case as though the facts show, and the lower courts found, that he had two occupations, one legal and one illegal (Pet. 8). We understand the lower courts to have found that petitioner had only one occupation, and that one an illegal activity. It is true that the Court of Appeals noted that "it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some 'legal occupation' " (Pet. App. 8a). When applied to petitioner's case, however, that would mean that if petitioner so understood the question he should have answered "none", since the facts show that he had no legal occupation. The uncontroverted facts show that petitioner was engaged for a long period of time in an illegal business from which he earned large amounts of money, that his real estate dealings as of May 1, 1925 were few in number and devoid of profit. He therefore was not actually occupied in real estate, and on three different occasions he wilfully gave false an-

swers when he stated that his occupation was real estate.*

(b) Petitioner's reliance upon *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670, is misplaced. In those cases, the Court held that the question which the defendants answered incorrectly could easily have been interpreted by them "as a two-pronged inquiry relating simply to anarchy"

* Petitioner extends the opinion of the court below by his assertion that the Court of Appeals concluded that his failure to testify warranted the inference that petitioner understood the question as to occupation to call for disclosure of all income-producing activities, legal or illegal (Pet. 9, see 9-11 generally). The Court of Appeals noted that, if petitioner had engaged in any real estate transactions other than those reflected in this record, those other transactions would be peculiarly within petitioner's knowledge, and his failure to prove them warranted the inference that there were none (Pet. 8a). Proof by petitioner would not have required taking the stand. If other real estate transactions existed, they could be proved in some manner other than through petitioner's testimony. The rational connection between petitioner's failure to show other dealings and the inference that there were no other real estate transactions is sufficiently strong, and the comparative convenience of producing additional evidence sufficiently favorable to petitioner, to render the inference permissible even in a criminal case (which this was not). See *Morrison et al. v. California*, 291 U.S. 82, 87-90; compare *Tot v. United States*, 319 U.S. 463, 467-470; *Speiser v. Randall*, 357 U.S. 513, 523-524.

The Court of Appeals also noted (Pet. 8a) that an applicant might believe that the answer called for no more than a disclosure of some legal occupation, but that there was no evidence that petitioner so believed. We do not think that this should be construed as a statement that petitioner's failure to take the stand warranted the inference that petitioner understood the question to require disclosure of all occupations. Rather, we read the language of the Court of Appeals to mean that, though one might conceive of a case in which an applicant had misunderstood the question, in this case the government's uncontradicted evidence (discussed *supra*, pp. 11-14) showed that petitioner had not misunderstood the question and petitioner had not presented any evidence to refute the government's showing.

rather than as an inquiry as to membership in either an anarchistic or a communistic organization (356 U.S. at 664; see 356 U.S. at 672). But that construction flowed from the very question at issue in those cases. The question, which appeared in the preliminary form for petition for naturalization at the time those defendants were naturalized, read as follows (356 U.S. at 663):

28. Are you a believer in anarchy . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country?

...

Although the two halves of the second part of the question, referring to "anarchy" and "overthrow", were phrased disjunctively as a matter of syntax, the Court concluded that it was sufficiently misleading to make "it not implausible to read the question in its totality as inquiring solely about anarchy" (356 U.S. at 664). Here, however, there was no such possibility of confusion. The question answered falsely by petitioner was very simple: "My present occupation is _____." Moreover, we think it significant that petitioner falsely stated that his business or occupation was real estate, not once but three times, at three separate points in the naturalization process.

This case does not involve issues similar to those in *Chaunt v. United States*, No. 593, this Term, certiorari granted, February 29, 1960, and *Polites v. United States*, No. 631, this Term, certiorari granted, February 23, 1960. In *Polites*, issues raised by the petitioner are (1) whether he is entitled under Rule 60(b) of the

Federal Rules of Civil Procedure to attack collaterally the judgment of denaturalization; and (2) if so, whether his denaturalization based on proof of Communist party membership was valid (Govt. Brief, No. 631, pp. 6-12). Whatever issues depend on the nature of the questions asked, nothing turns on the simple question of occupation involved in this case. In *Chaunt*, No. 593, the issues raised are (1) whether concealment of arrest, not specified in the affidavit of good cause, may be relied upon for denaturalization and (2) whether concealment of the particular arrest there involved represents concealment of a material fact. The resolution of the issues in *Chaunt* will have no bearing on the issues in this case. Here, the affidavits of good cause and their attached exhibits alleged the concealment and misrepresentation of petitioner's occupation. And this petitioner has never questioned the materiality of his misrepresentation; his only contention in this area is that the government's inquiry as to occupation could reasonably be interpreted as calling for a statement as to some legal occupation, so that his misrepresentation was not wilful.

2. Both lower courts considered and rejected petitioner's argument (Pet. 11-12) that the government ought not be permitted to institute denaturalization proceedings an appreciable length of time after the certificate of naturalization is issued (Pet. 3a; R. 36-39). In the words of the Court of Appeals, "This statute [§340(a) of the Immigration and Nationality Act of 1952, *supra*, p. 2] contains no provision for limitations, nor is there any other federal statute applicable to the case." (Pet. 3a). The courts below

held further that the United States is not subject to the defense of laches in enforcing its rights, quoting from *United States v. Summerlin*, 310 U.S. 414, 416 (Pet. 3a; R. 37), and citing numerous denaturalization cases in which that doctrine has been applied (R. 37-39).

Petitioner contends (Pet. 11-12) that sovereign immunity from laches works a hardship on him and is not sound public policy when applied to this case, because, between the time of naturalization and the institution of denaturalization proceedings, "the naturalization examiners who processed petitioner's application, the witnesses who testified on his behalf, and the judge who admitted him to citizenship have all died" (Pet. 12). This is not a sufficient reason to preclude the government from cancelling a certificate procured by misrepresentation. The government bears a heavy burden of proof in making out its case for denaturalization,⁷ and that very burden provides a sufficient safeguard against denaturalization judgments founded on the time-dimmed recollection of uncorroborated hostile witnesses. The aim of the proceeding is merely to deprive the defendant of "his ill-gotten privileges", *Johannessen v. United States*, 225 U.S. 227, 242, and Congress has decided that, so long as the government can show by clear, convincing, unequivocal evidence that the privileges were in fact "ill-gotten", it ought to be permitted to do so.

Moreover, petitioner's argument has no application to his own case. The issue in this case was the falsity

⁷ See *Schneiderman v. United States*, 320 U.S. 118, 158; *Baumgartner v. United States*, 322 U.S. 665, 670-672; *Knauer v. United States*, 328 U.S. 654.

of petitioner's sworn statements as to his occupation. The primary proof that petitioner's statements were not only false, but wilfully false, flows from his own admissions made subsequent to his naturalization. And the evidence as to his real estate transactions was drawn from public records unaltered by the passage of time.

3. The trial court fully explored the question of unauthorized interceptions and divulgences of petitioner's telephone communications and ascertained that no agency of government, state or federal, learned anything regarding petitioner's illegal dealings in liquor, directly or indirectly, as a result of wiretapping (R. 40-41). The most that can be said is that a state grand jury investigation of the political nomination of a state judge was precipitated by an interception made by New York officers; that petitioner was a witness before this grand jury; and that he testified as to his prior violation of the prohibition laws when questioned regarding his background. In these circumstances, the District Court was clearly correct in concluding that *Nardone v. United States*, 308 U.S. 338, does not require that petitioner "be granted immunity for any admissions which he thereafter made, not in the telephone conversations but in answer to any [collateral] questions in a later investigation." (R. 41-42).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.*

J. LEE RANKIN,

Solicitor General.

MALCOLM RICHARD WILKEY,

Assistant Attorney General.

BEATRICE ROSENBERG,

EUGENE L. GRIMM,

Attorneys.

APRIL, 1960.

* On April 18, 1960, after this brief had been written and sent to the printer, the Government was served with a "Motion for leave to amend Petition for a Writ of Certiorari and Amendment to Petition." We shall answer this motion separately.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 802

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON MOTION FOR LEAVE TO AMEND PETITION FOR A WRIT OF
CERTIORARI**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has filed (on April 15, 1960) a motion for leave to amend the petition for a writ of certiorari (filed March 18, 1960) so as to include a question of *res judicata* not raised in the petition as originally filed. No claim is made that petitioner was not aware of the issue at the time he filed his original petition. Indeed, no such claim could be made since petitioner injected the issue into the case at the district court level. It is the government's view that petitioner has shown no valid reason for raising the issue so belatedly—two days before the response to the petition for certiorari was due. Certainly, such a practice ought not be encouraged in the absence of a strong showing that special circumstances occa-

(1)

sioned the delay. No such showing has been made. In addition, we point out that the question sought to be raised is not one which requires consideration by this Court.

1. The issue raised in petitioner's motion stems from the following facts. In a prior denaturalization action against petitioner, an affidavit of good cause was not filed simultaneously with the complaint. The district court, for other reasons not pertinent here, dismissed the cause without prejudice to the government's right to institute a new proceeding on the same ground. 145 F. Supp. 892, 897. This judgment was reversed by the court of appeals. 247 F. 2d 384. When the court of appeals' judgment was reviewed on certiorari, this Court reversed for a reason not considered by the court of appeals, i.e., that the affidavit of good cause had not been filed with the complaint. 356 U.S. 256. The Court remanded the cause to the district court with directions "to dismiss the complaint." 356 U.S. 256.

After remand, the government presented to the district court a proposed order for dismissal "without prejudice." The district court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (dated May 31, 1958).

After the instant denaturalization action had been instituted in the district court, petitioner moved to dismiss the complaint on the ground that dismissal of the prior proceeding barred the instant action on principles of *res judicata*. He argued that, under

Rule 41(b) of the Rules of Civil Procedure,¹ the order of dismissal, since it did not specify that it was "without prejudice," operated as an adjudication on the merits, and that the government, if it had wished to avoid such effect, should have appealed from the order of May 31, 1958. This contention was overruled by the district court on February 20, 1959, on the ground that the dismissal of the prior action was for lack of jurisdiction in the sense that the term jurisdiction is used in Rule 41(b). 171 F. Supp. 10, 22. On appeal, petitioner renewed his contention that the dismissal of the prior action operated as one with prejudice and therefore barred the present action. The court of appeals dealt with this contention in its opinion of February 17, 1960 (a copy of which appears as an appendix to the petition for a writ of certiorari). Without deciding what is or is not a dismissal for lack of jurisdiction within the purview of Rule 41(b), the court of appeals ruled that the dismissal of the prior proceeding, pursuant to the mandate of this Court, did not operate to bar the present action. It stated (Pet. 12a-13a):

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There

¹ Rule 41(b) provides: "* * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

4

must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

In the course of its opinion, the court of appeals also said (Pet. 11a):

There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the complaint should be "without prejudice." However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In the petition for a writ of certiorari, filed by petitioner on March 18, 1960, petitioner did not attack the ruling of the court of appeals that the prior dismissal did not bar the present action. His alleged reason for attempting to do so now, a month later, is that the Solicitor General, by filing a petition for a writ of certiorari in *United States v. Lucchesi*, No. 789, has indicated that "the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court" (Motion, p. 3). As we show

below, however, the government has consistently taken the position in *Lucchese* that it was merely attempting to protect its rights in the event of an adverse decision by this Court in the present case, and indeed had already moved to dismiss its *Lucchese* petition before it was served with, or had heard about, petitioner's present motion.

2. In *Lucchese*, which arose in the Eastern District of New York, this Court, at the same time it remanded the first action against petitioner Costello, also remanded the denaturalization action involving *Lucchese* with directions to dismiss the complaint because of the failure to file an affidavit of good cause with the complaint. 356 U.S. 256. Upon remand, the government submitted to the district court a proposed form of order dismissing the complaint without prejudice. The district court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal without any specification as to prejudice. This was done on July 16, 1959, and a motion for resettlement was denied on July 24, 1959.

At the time the district court order was entered in *Lucchese*, Costello had advanced the contention that the government's failure to appeal the order of dismissal entered in the first action against him barred the second. Indeed, this contention was before the court of appeals. In order to protect its right to bring a new action against *Lucchese* in the event of a ruling favorable to Costello's position, the government noted an appeal from the order in *Lucchese* insofar as it had failed to specify that the dismissal of the action was without prejudice. *Lucchese* made

a motion in the court of appeals to dismiss the appeal. Although the instant case had not been decided, a panel of the court of appeals (different from the panel which decided the instant case) dismissed the government's appeal in *Lucchese* on October 15, 1959, stating that there was no basis for the district court "to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment."

Thereafter, on February 17, 1960, the court of appeals rendered its decision in *Costello*, including the statement quoted above (*supra*, pp. 3-4) that it may have been error for the district court not to have included the words "without prejudice," and that such error would have been correctible on appeal. Because this language seemed inconsistent with the statements of the panel of the court of appeals which decided *Lucchese*, the government moved in *Lucchese* for leave to file an untimely petition for rehearing of the dismissal of its appeal, but this motion was denied by the court of appeals on March 11, 1960. The last date on which the government could file a petition for a writ of certiorari in *Lucchese* was March 14, 1960.² Since, at that time, the petition for a writ of certiorari in the instant *Costello* case had not been served, the government, not knowing what issues *Costello* intended to raise, felt that it was necessary to file a petition for a writ of certiorari in *Lucchese*, so that, if this Court should decide to consider the *Costello* case, including the possible issue as to *res judicata*, the two cases, which are obviously inter-

² The full 60-day extension was sought and obtained.

related on this point, could be considered together. The government in its *Lucchese* petition made it clear, however, that it did not consider the point of sufficient importance to warrant bringing it before this Court as an independent matter. It said (Pet. No. 789, p. 9) that if "Costello does not file a petition for certiorari raising the *res judicata* issue (or if he files such a petition and it is denied as to this point) we would withdraw this present petition."

In accordance with this statement, the government, on April 15, 1960, moved under Rule 60(2) of the Rules of this Court to withdraw its petition for a writ of certiorari in *Lucchese*, No. 789. On April 18, 1960, it was served with the motion to amend the petition in the instant case. It therefore has moved in No. 789 to have action withheld on its motion to withdraw in that case until the present motion is determined or, if leave to amend the instant petition is granted, until the Court has acted on the *res judicata* issue in this case.

3. It is evident from the foregoing facts that the government's action in filing a petition for a writ of certiorari in *Lucchese* does not endow the *res judicata* issue in this case with any greater significance than it had when petitioner filed his original petition for a writ of certiorari without raising that issue. Petitioner's original judgment that the issue was not one warranting review by this Court is, we submit, a correct one.

As the court of appeals said in its opinion in the instant case, "It would be a violation of the intention of all the courts concerned if the dismissal of the

earlier complaint were held in this case to be a judgment on the merits." The government's only concern on this issue, here and in *Lucchese*, has been to make certain that the dismissal of a complaint for failure to file an affidavit of good cause, without a decision on the merits, pursuant to the mandate of this Court, not be considered a bar to an action for denaturalization properly instituted together with an affidavit of good cause—in other words, that no technical considerations, based on the wording of this Court's remand, shall operate to make the failure to file the preliminary affidavit a conclusive adjudication on the merits. The government believes that the intention of this Court not to adjudicate the merits was so clear when it directed dismissal for failure to file an affidavit with the complaint that it was within the authority of the district court to make that intention express by entering an order dismissing the complaint "without prejudice."³ But whether the district court did so or not, the only question that the government regards as significant is that the intention of this Court in its remand be effectuated. Since this Court clearly did not intend its adjudication to be on the merits, and since the court of appeals below has recognized and given effect to that intention, we

³ An appellate court's mandate, while of course binding on a lower court as to all matters encompassed therein, leaves the lower court free as to any issue within its jurisdiction which was not settled by the higher court's decision. *Sprague v. Ticonic Bank*, 307 U.S. 161, 168; *In re Sanford Ford & Tool Co.*, 160 U.S. 247, 255-256; *Christoffel v. United States*, 214 F. 2d 265. (C.A.D.C.), certiorari denied, 348 U.S. 850.

do not believe that there is an issue requiring resolution by this Court.

It is therefore respectfully submitted that the motion to amend the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

APRIL 1960.

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No. 59

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 59

FRANK COSTELLO, *Petitioner*

v.

UNITED STATES OF AMERICA

Writ of Certiorari to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court is reported at 71 F. Supp. 10, and the opinion of the Court of Appeals is reported at 275 F.2d 355.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (R. 255). The petition for a writ of certiorari was filed on March 18, 1960, and a motion for leave to amend the petition was filed on April 15, 1960. On May 16, 1960 the petition was granted and the motion to amend was assigned for hearing and consolidated with the argument on the merits in *United States v. Lucchese*, No. 57, Oct. Term 1960. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U.S.C. § 1451:

“(a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.”

Section 605 of the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605:

"No person receiving or assisting in receiving, or transmitting; or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use

of the general public, or relating to ships in distress."

Rule 41(b), Federal Rules of Civil Procedure:

"Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

QUESTIONS PRESENTED

1. Whether petitioner can be denaturalized for representing that his occupation was "real estate" when he was concededly engaged in the real estate business and the government's inquiry could reasonably be interpreted as calling for no more than his legal occupation.

2. Whether the Court is entitled to draw any inference from petitioner's failure to take the stand in a denaturalization case.

3. Whether due process permits denaturalization where citizenship was granted thirty-three years prior to the institution of suit, the facts alleged as a basis for denaturalization were known to the government thirty-two years prior to the institution of suit, and many material witnesses have become unavailable by reason of death.

4. Whether a decree of denaturalization may rest in part upon evidence tainted by wiretapping.

5. Whether the present proceedings are barred by entry of an order dismissing prior denaturalization proceedings against petitioner, which was entered pursuant to the mandate of this Court and which did not specify whether it was with or without prejudice.

STATEMENT OF THE CASE

Petitioner came to the United States from Italy in 1895, when he was four years old. He was admitted to citizenship by the United States District Court for the Southern District of New York in 1925.

This case represents the government's second attempt to revoke petitioner's citizenship. On October 22, 1952, it filed a complaint seeking his denaturalization under § 338 of the Nationality Act of 1940, 54 Stat. 1158. Pretrial motions to dismiss on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint were denied. 142 F. Supp. 290, 325. On the fourth day of trial, however, Judge Palmieri granted petitioner's motion to dismiss on the ground that both the affidavit of good cause and the government's evidence at trial were extensively tainted by wiretapping. 145 F. Supp. 892. The Court of Appeals reversed, holding that evidence derived from wiretapping by state officers is admissible

in the federal courts and alternatively that the trial court should have afforded the government an opportunity to file a new affidavit of good cause and to demonstrate that it had sufficient untainted evidence at trial.¹ 247 F.2d 384. On April 7, 1958, this Court granted certiorari and reversed with directions to dismiss the complaint, on the ground that the affidavit of good cause should have been filed contemporaneously with the complaint. 356 U.S. 256.

Upon remand the District Court felt constrained by the mandate of this Court to enter an order of dismissal which did not specify whether it was with or without prejudice. The government presented a proposed order for dismissal "without prejudice," but it took no appeal from the court's refusal to sign this order.

On May 1, 1958, the government filed a new complaint seeking petitioner's denaturalization under § 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260 (R. 3-14). Factually the allegations of this complaint are very similar to the allegations of the prior complaint. It alleges that petitioner procured his citizenship by wilful misrepresentation in that: (a) he stated that his occupation was real estate, whereas his occupation was the illicit purchase and sale of alcohol; (b) he stated that Harry C. Sausser, one of his naturalization witnesses, was in the real estate business and had personal knowledge of his good moral character, whereas Sausser was engaged with him in the illicit purchase and sale of alcohol; (c) he stated that the only other name he had ever used was

¹ This opinion was handed down prior to the decision in *Benanti v. United States*, 355 U.S. 96.

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Francisco Castiglia, whereas he had also used the names Frank Stello and Frank Saverio; (d) he stated that he would support and defend the Constitution and laws of the United States and that he would bear true faith and allegiance to the same, whereas he was then violating both federal and state laws relating to alcohol and income tax and intended to continue so to do; and (e) he stated that he had never been arrested or convicted, whereas he had been arrested four times and convicted of unlawful possession of a firearm. The complaint further alleged that petitioner procured his citizenship by concealment of a material fact, in that he concealed the fact that Sausser was engaged with him in the illicit purchase and sale of alcohol and knew him to be a person of bad moral character.

This case came on for trial before Judge Dawson, who found that the government had established two of the foregoing allegations, namely, allegations (a) and (d), *supra*, and judgment was entered revoking petitioner's naturalization.² Judge Dawson stated that he was not convinced that any of the government's other allegations had been established by the degree of proof requisite in an action of this nature (R. 29).

The evidence relevant to petitioner's occupation and oath of allegiance may be summarized as follows. Joseph Conway, a former letter carrier, testified that he had delivered mail addressed to Frank Costello, Edward Costello, Harry Sausser, Edward Ellis, and others at 405 Lexington Avenue during 1924-1926 (R. 52-53). He saw petitioner and Sausser three or four

² The opinion does not discuss petitioner's alleged tax offenses, and it is clear that Judge Dawson relied solely upon his alleged alcohol offenses as showing a state of mind inconsistent with the oath of allegiance.

times a week at this office (R. 55). It was stipulated, however, that the office telephone was listed in the name of Edward Costello, petitioner's brother (R. 58).

Emanuel Kessler testified that he went into the bootlegging business in 1920 and in the following year acquired an ocean-going vessel which transported whiskey from Europe (R. 60). The whiskey was landed at night on Long Island by means of small fishing boats (R. 60). Petitioner told Kessler that he and his brother would haul the merchandise from Long Island if Kessler would buy some trucks for them (R. 61-62). Thereafter Kessler financed the purchase of two or three trucks, and petitioner or his brother commenced to haul the liquor (R. 62). It was stored in a garage belonging to Edward Costello and also in the Blackwell Mansion, a residence owned or leased by unspecified members of the Costello family (R. 62-64). Kessler would telephone the Costellos' office at 405 Lexington Avenue to make the necessary arrangements (R. 62-63). He paid two dollars per case for transportation and storage, and approximately 3000 cases were imported each week (R. 64-65). These arrangements continued until Kessler was sent to the penitentiary for bootlegging at the end of 1923 (R. 59, 61).

This witness testified that in 1922 or 1923 he had accused petitioner of converting 500 cases of whiskey which were stored in the Blackwell Mansion (R. 66-67). He also testified that he left petitioner 100 or 200 cases when he went to prison and that petitioner subsequently refused to pay for them (R. 67-68).

Kessler's testimony was unclear as to the extent of petitioner's participation in the trucking enterprise. He first testified that he did not know what interest petitioner had in it, if any (R. 62, 65, 67, 71, 73). After

a lengthy cross-examination, however, he testified that petitioner's brother "ran the trucking business" (R. 74).

The government introduced the deposition of Albert Feldman, also a former bootlegger, who testified that petitioner agreed to store 1000 cases of whiskey for him prior to Kessler's conviction (R. 168-170). Subsequently petitioner advised Feldman that he had a customer for the liquor in Buffalo, but the liquor disappeared en route and petitioner never reimbursed Feldman (R. 172-174). Feldman further testified that he witnessed an argument between petitioner and Kessler over the alleged disappearance of certain liquor (R. 174-176).

Frank Kelly testified concerning bootlegging activities at a later date. He stated that one Coffey introduced him to petitioner and Harry Sausser shortly before they were all indicted in December of 1925 (R. 82-83). He agreed to let Sausser store some merchandise on his vessel, the *Vincent A. White* (R. 81, 84-85). Sausser and petitioner were present once or twice when unsuccessful attempts were made to land this liquor (R. 85). The witness was uncertain whether petitioner overheard his original conversation with Sausser (R. 87-93). None of the liquor was ever landed and the *Vincent A. White* took it back to Nova Scotia after the indictment was returned (R. 85, 94).

A deposition of Sausser's daughter, Helen, was read into evidence by the government. She testified that she was born in 1907 and that her family moved to Commack, Long Island, in 1924 or 1925 (R. 109, 112-114). Petitioner attended several social gatherings at their Commack residence (R. 115). Miss Sausser

testified that petitioner and her father were in the bootlegging business together and shared an office on Lexington Avenue (R. 116-118). This testimony was based upon conversations which she claimed to have overheard while she was an adolescent (R. 118-120, 127-131). Objections to this testimony on the ground of hearsay and uncertainty were overruled (R. 119, 121-123). Miss Sausser stated that she did not think her father was in the real estate business and that she did not think the Lexington Avenue office was a real estate office (R. 123). This testimony was based upon the fact that she never heard her father discuss the real estate business and that on the three or four occasions when she visited the office she did not hear any discussion of real estate (R. 131-132). Her father died in Canada on September 28, 1926 (R. 123-124). Petitioner sent her mother a telegram promising to forward money, but never did so (R. 125-126).

The government then introduced the deposition of one John McLeod. This witness testified that he joined the Coast Guard in April of 1925 and that subsequently he overheard Sausser talk about losing a boat loaded with liquor (R. 135-137).

The deposition of Philip Coffey was also introduced by the government. Coffey was arrested for violation of the National Prohibition Act in 1925 but the jury were unable to agree (R. 139). He worked for Kessler and later purchased liquor from Eddie Costello (R. 139-143). He saw petitioner in the Lexington Avenue office but all his business was with Eddie (R. 144-146). In 1953 he signed a statement at the office of the Immigration and Naturalization Service to the effect that he had purchased liquor from petitioner (R. 146-147, 149). In this deposition, however,

he swore that all of his business was with Eddie, although he discussed the matter with petitioner as well (R. 149-151).

Coffey further testified that he unloaded the *Vincent A. White* shortly prior to his arrest at the request of Frank Kelly (R. 152-153). One Ellis paid him for this work at the Lexington Avenue office (R. 155). He testified that he "probably" knew petitioner and Kelly were in this deal together, and that he "probably" thought the liquor was petitioner's because petitioner was with Kelly when it was unloaded (R. 156, 159).

At the conclusion of its case, the government introduced certain extrajudicial admissions by petitioner. In a statement given to Special Agent James N. Sullivan of the Bureau of Internal Revenue in 1938, petitioner testified that he was in the liquor business from 1923 or 1924 until about a year or two before repeal (R. 177-178).

Petitioner also testified before a federal grand jury in 1939 that he "did a little bootlegging" and that "the last time was around 1926" (R. 180).

In 1943 petitioner testified at length before a New York State grand jury and an official referee appointed by the Appellate Division in connection with the election of Judge Thomas A. Aurelio to the New York Supreme Court. Judge Palmieri found at the prior trial that this testimony was extensively infected by wiretapping. 145 F. Supp. 892. It was nevertheless re-offered, and was admitted by Judge Dawson, who relied heavily upon it in his opinion (R. 23-25).

Petitioner testified before the state grand jury that he had advanced substantial sums to one Arnold

Rothstein during the 1920's; that he might have obtained this money, "bringing a little whiskey in"; that he was in the bootlegging business during prohibition; that he had an office at 405 Lexington Avenue as early as 1925; that one Jim O'Connell trucked whiskey for him; that in 1936 he filed state income tax returns for the years 1919-1932 showing an aggregate income of \$305,000; and that he reported an income of \$51,000 for 1927, \$48,000 for 1929, and \$35,000 for 1930 (R. 183-188). Petitioner further testified that "maybe" most of this money came from bootlegging, but that he was also in the real estate business and that he recalled making \$25,000 on the sale of a building at West End Avenue and 92nd Street (R. 188-189). This transaction was handled through the Koslo Corporation (R. 188). Petitioner stated that the money which he invested might have been obtained from liquor and gambling and that he could not distinguish between the two sources (R. 189).

The foregoing testimony was in substance repeated before a special master appointed by the Appellate Division. This testimony was also admitted into evidence over objection on the ground of wiretapping (R. 190-192).

Petitioner's testimony before the New York State Liquor Authority in 1947 was likewise introduced by the government. Petitioner there testified that he had been in real estate, gambling, and bootlegging; that he was engaged in bootlegging from 1923 until 1926 or 1927; that he imported whiskey into the United States during this period; that his headquarters were located at 405 Lexington Avenue; and that he purchased liquor in Canada through Harry Sausser (R. 194-196).

As part of its case, the government introduced the official records relating to petitioner's naturalization, which were annexed to the complaint as part of Exhibit A. The preliminary form bears the date May 1, 1925, and lists his occupation as "real estate" (Gov't Ex. 7; R. 200-201). The docket slip, which consists of typed notations made by the naturalization examiner who examined petitioner and his two witnesses, is also dated May 1, 1925, and also lists his occupation as "real estate" (Gov't Ex. 8; R. 202-203). The formal petition for naturalization bears the same date and lists the same occupation (Gov't Ex. 9; R. 204-205). It contains an oath of allegiance which was subscribed by petitioner at the time of his naturalization on September 10, 1925.

Petitioner relied upon documentary proof to establish the truthfulness of his statements concerning his occupation. Most of this documentary proof was produced by Harold Kapner, a government witness who had searched the records of Manhattan, Brooklyn, Queens, and the Bronx covering the years 1920-1926 for real estate transactions involving this petitioner (R. 94). Kapner testified that during this investigation he learned that petitioner was associated with the Koslo Realty Corporation, and he produced its certificate of incorporation dated October 31, 1924, and recorded December 22, 1924 (R. 106; Gov't Ex. 23; R. 217-222). He likewise learned that one Samuel Beilin had been associated with petitioner in the Koslo Realty Corporation (R. 97-98).

Kapner produced records showing that on December 1, 1924, Koslo purchased certain property located at West End Avenue and 92nd Street in Manhattan from Samuel and Anna Beilin, subject to mortgages

aggregating \$76,800 (Gov't Ex. 18; R. 208). Koslo is described in the deed as "a domestic corporation having its office and principal place of business at 217 Broadway." On June 22, 1925, Koslo sold these premises, together with the buildings and improvements located thereon, to the 666 West End Avenue Corporation, subject to prior mortgages aggregating \$75,600 and a purchase money mortgage of \$41,230 (Gov't Ex. 17 and 24; R. 206-207, 223-224). This deed was signed by one Louis E. Felix as president of Koslo. The purchase money mortgage was released on December 21, 1925, and the release was signed by Frank Costello as president of Koslo (Gov't Ex. 25; R. 225-226).

Kapner produced records showing a second series of transactions by Koslo during this period. On August 12, 1925, Koslo purchased three lots in the Bronx from Mary C. and Minnie R. Newell (Gov't Ex. 19 and 20; R. 209-212). On June 22, 1926, Koslo sold this property to the Rosenblum Realty Corporation (Def't Ex. C; R. 231-232). Koslo is described in all of these deeds as a domestic corporation having its principal place of business at 405 Lexington Avenue, and the deed to Rosenblum Realty was signed by Samuel Beilin as treasurer of Koslo.

The third and apparently the largest transaction of Koslo during this period involves several pieces of ground on Nelson Avenue in the Bronx. On October 26, 1925, Koslo purchased this land from the Claire Building Corporation and gave back purchase money mortgages aggregating \$70,000 (Gov't Ex. 21 and 22; R. 213-216). In this transaction Koslo used the address 217 Broadway. On July 15, 1926, Koslo deeded the land, with the buildings and improvements

thereon, to the R. G. & F. Construction Corporation subject to mortgages aggregating \$310,000 and also subject "to present leaseings, lettings and tenancies" (Def't Ex. A and B; R. 227-230). These deeds were signed by Samuel Beilin as secretary.

In addition to the documentary evidence relating to Koslo, petitioner introduced the certificates of incorporation for the Babylon Waterfront Corporation and White Homes, Inc. (Def't Ex. D and E; R. 233-244). These were both New York corporations formed in 1926 and authorized to engage in the real estate business. Petitioner was named as an original director of both corporations, and he also signed the White Homes certificate as one of the incorporators. The Babylon Waterfront certificate indicates on its face that it was drafted by "Louis E. Felix, Attorney & Counselor at Law, #217 Broadway," who likewise signed the certificate as an incorporator. Kapner testified that petitioner was associated with both of these corporations (R. 106).

Petitioner elected to stand upon the government's evidence, except for the introduction of certain exhibits. After lengthy argument by counsel, Judge Dawson reserved decision. On February 20, 1959, he handed down an opinion which constituted his findings of fact and conclusions of law.

In this opinion, Judge Dawson found that the government had established two allegations constituting wilful misrepresentation and fraud, namely (R. 22):

"1. That the defendant stated that his occupation was 'real estate' whereas his true occupation was bootlegging.

"2. That the defendant swore in his oath of allegiance to the United States, on September 10, 1925, that 'I will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same;' whereas at the time the defendant was actually engaged in a course of activity which flouted the Constitution of the United States and was designed to violate the laws of the United States."

A supplemental judgment was entered on March 9, 1959, cancelling petitioner's certificate of naturalization (R. 43-44). Petitioner filed a notice of appeal on April 17, 1959 (R. 44). The Court of Appeals affirmed on February 17, 1960 (R. 245). It concluded that petitioner was guilty of wilful misrepresentation when he stated that his occupation was "real estate." It conceded, however, that petitioner was associated with a real estate company of which he later became president and that the government's inquiry as to occupation could have been construed as calling for no more than his legal occupation (R. 250-251).

The Court of Appeals was not satisfied that petitioner's oath of allegiance sustained a finding of fraud (R. 251). It expressly declined to pass upon any of the other allegations of the complaint, since they had not been relied upon by the trial court (R. 249). Nor did it pass upon the admissibility of petitioner's statements to New York State authorities. The defenses of laches and res judicata were held inapplicable.

SUMMARY OF ARGUMENT

The decision of the court below is completely inconsistent with this Court's decisions in *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670. There petitioners were asked whether they believed in anarchy or belonged to any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is presented in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation. There is uncontroverted documentary evidence of several substantial real estate transactions consummated by Koslo during this period. The Court of Appeals further found that petitioner could reasonably have interpreted the government's inquiry as calling for no more than the disclosure of his legal occupation. Under these circumstances, petitioner could not be guilty of any wilful misrepresentation when he answered "real estate."

Petitioner did not elect to take the stand on his own behalf. The Court of Appeals concluded that he had no constitutional right to stand silent because he was not a criminal defendant. It then held that while an applicant for citizenship might reasonably believe he

was bound to disclose only his legal occupation, there was no evidence that petitioner so believed. In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

Here again, the Court of Appeals followed a course squarely contrary to the *Nowak* decision. This Court specifically refused to infer from Nowak's silence that he understood the crucial question as calling for disclosure of membership in both anarchistic and non-anarchistic organizations advocating the violent overthrow of government. The quasi-criminal character of denaturalization proceedings is generally conceded. It compels recognition of the defendant's right to stand silent and put the government to its proof.

The Court of Appeals overruled the defense of laches with some reluctance, recognizing the hardship which results from cancelling a certificate of naturalization issued over thirty years ago. Petitioner was indicted for violation of the prohibition laws in the same court where he was naturalized one year after his certificate of naturalization was issued. The jury was unable to reach a verdict and ultimately the case was dismissed. It was the duty of the United States Attorney to institute denaturalization proceedings, if in fact petitioner's alleged offenses constituted "good cause" therefor. Instead, he waited for twenty-seven years before filing a complaint, while vital witnesses became unavailable to petitioner by reason of death. Under these circumstances, fundamental concepts of due process are violated by the present proceedings.

A subsidiary question presented by the petition for certiorari involves certain extrajudicial statements of petitioner which were heavily relied upon by both courts below. In the prior denaturalization proceedings against petitioner, the statements were excluded on the ground that they had been obtained by confronting petitioner with unlawfully intercepted telephone conversations to which he was a party. It is his position that the trial court was right the first time and that these statements must be excluded from consideration in determining whether the government's proof meets the exacting standards laid down in *Nowak and Maisenberg*.

Petitioner has moved for leave to amend the petition for certiorari by adding as a separate question the effect of the dismissal of prior denaturalization proceedings. These proceedings were dismissed pursuant to the mandate of this Court because the government's affidavit of good cause was not timely filed. The order of dismissal did not specify whether it was with or without prejudice. Under the plain language of Rule 41(b) of the Federal Rules of Criminal Procedure, it must hence operate as a dismissal with prejudice. The Court of Appeals conceded that none of the stated exceptions to this rule are applicable. Its attempt to create an unstated exception where dismissal is entered pursuant to the mandate of a higher court would create endless confusion in other cases. Moreover, the interests of justice are best served by a dismissal with prejudice where petitioner had already devoted six years to the defense of his citizenship in three different courts.

ARGUMENT**I. The Government Has Failed To Establish That Petitioner Misrepresented His Occupation**

The most important and often reiterated allegation in the government's complaint is that petitioner misrepresented his occupation. The complaint alleges that he described his occupation as "real estate" in the preliminary form for naturalization, in the course of oral examination by the naturalization authorities, and again in the actual petition for naturalization, whereas his true occupation was the illicit purchase and sale of alcohol. These representations constitute the sole basis for denaturalization relied upon by the Court of Appeals.

Under the authorities, however, petitioner's citizenship cannot be revoked on this ground unless the government has proved that he was not in the real estate business at all, or, alternatively, that he represented real estate as his only income-producing activity at a time when he was also engaged in the illicit alcohol traffic. The government has never urged the latter interpretation of petitioner's answers as to occupation, and hence it undertook to establish that he was not in fact in the real estate business at all.

The government's own witness, Harold Kapner, produced clear documentary proof fatal to the government's position on this issue. Kapner testified that petitioner and one Beilin were associated with the Koslo Realty Corporation (R. 97-98, 106). He then produced deeds showing that Koslo purchased certain property located at West End Avenue and 92nd Street on December 1, 1924, exactly five months prior to the date which appears on petitioner's preliminary form, docket slip, and petition for naturalization

(Gov't Ex. 18; R. 208). Koslo sold these premises less than two months after this date, and a very substantial purchase money mortgage was released on December 21, 1925, approximately three months after petitioner was admitted to citizenship (Gov't Ex. 17, 24, 25; R. 206-207, 223-226). The release was signed by petitioner as *president of the Koslo Realty Corporation*. The government produced sworn testimony by petitioner in 1943 to the effect that he made a profit of \$25,000 on this transaction alone (R. 188-189).

On August 12, 1925, one month before petitioner was admitted to citizenship, Koslo purchased three parcels of ground in the Bronx which were subsequently sold to the Rosenblum Realty Corporation (Gov't Ex. 19, 20; Def't Ex. C; R. 209-212, 231-232). Koslo is described in this transaction as a domestic corporation *having its principal place of business at 405 Lexington Avenue*, concededly an office used by petitioner during this period. The deed to Rosenblum Realty Corporation was signed by Beilin as treasurer of Koslo, and the government's own witness testified that Beilin was associated with petitioner in this corporation.

On October 26, 1925, six weeks after petitioner was admitted to citizenship, Koslo formalized its largest real estate transaction during this period, a transaction which must have been under negotiation at the very time of appellant's naturalization. The deeds show that Koslo purchased *unimproved* land which it subsequently deeded to the R. G. & F. Construction Corporation *with buildings and improvements*, subject to mortgages with an aggregate unpaid balance of \$310,000 and also subject "to present leaseings, lettings and tenancies" (Gov't Ex. 21, 22; Def't Ex. A, B; R. 213-216, 227-230). It is thus apparent that a large

apartment or office building was erected on the property while it was owned by Koslo. The deeds were again executed by petitioner's associate, Beilin, in his capacity as secretary of the corporation. Koslo used the address 217 Broadway, which was the office of Louis E. Felix, an attorney who was associated with petitioner's real estate activities (Def't Ex. D; R. 238).

Petitioner's continuing interest in the real estate business is attested by two certificates of incorporation for real estate corporations formed in 1926 (Def't Ex. D, E; R. 233-244). Petitioner was named in both certificates as a member of the original board of directors, and he also executed one certificate as an incorporator.

On the other hand, the evidence of petitioner's bootlegging activities during 1925 is extremely vague. Emanuel Kessler, the only witness whose testimony was apparently relied upon by the trial judge, went to prison in 1923 and gave no testimony whatsoever concerning petitioner's activities thereafter. Albert Feldman's testimony likewise related exclusively to events antedating Kessler's conviction. John McLeod's testimony related solely to Sausser's bootlegging activities and did not even mention petitioner. Frank Kelly testified that he agreed to store whiskey aboard the *Vincent A. White* at Sausser's request during 1925, but petitioner's only connection with this transaction was that he may have overheard the arrangements. Philip Coffey testified that he unloaded the *Vincent A. White* on one occasion during 1925 at Kelly's request, but here again petitioner's connection with the transaction was tenuous at best. The only other witness who testified concerning petitioner's alleged bootlegging during this period was Sausser's daughter.

Her testimony was based primarily upon conversations which she claimed to have overheard while she was still in her teens, and she was extremely vague on the subject of dates. She did not place any of these conversations definitely in 1925.

Petitioner's extrajudicial admissions likewise do not particularize the extent of his bootlegging activities in 1925. Special Agent Sullivan asked him whether he had "anything to do with the liquor business during the Prohibition era" and petitioner answered in the affirmative, fixing the period of time as "1923 or 1924 until about a year or two before Repeal" (R. 177). The nature and extent of his connection with the liquor business during this period were not explored. Similarly, petitioner told a federal grand jury that he "did a little bootlegging" and that "the last time was around 1926," but he was not asked for any details (R. 180).

It is petitioner's position that his testimony in the so-called Aurelio investigation is tainted by wire-tapping and cannot be considered by this Court in determining the sufficiency of the evidence.³ Moreover, while this testimony goes into some detail concerning petitioner's bootlegging activities, it fails to establish the extent of these activities during 1925. Petitioner admitted that he had made substantial sums "bringing a little whiskey in" during prohibition, and that in 1936 he filed income tax returns for the years 1919-1932 showing an aggregate income of \$305,000 (R. 185-188). He reported an aggregate income of \$134,000 for the years 1927, 1929, and 1930, leaving a balance of \$171,000 attributable to

³ See Point IV, *infra*, p. 39.

the remaining ten years, or an average annual income of \$17,100 per year during this period.

Petitioner testified that most of this income was derived from bootlegging, but he said that he was also in the real estate business and that he recalled making \$25,000 on the sale of a building at West End Avenue and 92nd Street (R. 188-189). The government's own exhibit shows that this profit was realized in 1925 and that petitioner was president of the corporation which handled the transaction. Consequently, the money which petitioner made from the real estate business in 1925 was substantially in excess of his average annual income during this period, indicating that the real estate business may well have been his principal or even sole source of income in 1925.

Finally, petitioner testified before the New York Liquor Authority that he had been in real estate, gambling, and bootlegging, and that he had imported whiskey from Canada during the years 1923-1926 or 1927 (R. 194-195). As was the case with the Sullivan and federal grand jury inquiries, however, he was never asked when, how much, or how often.

The sufficiency of the foregoing evidence must be measured by a very exacting standard of proof, which is virtually tantamount to proof beyond a reasonable doubt.⁴ In the landmark case of *Schneiderman v. United States*, 320 U.S. 118, this Court held that the government needs more than a bare preponderance of the evidence to prevail in a denaturalization case,

⁴ In applying this standard of proof, an appellate court is free to re-examine the evidence without regard to the "clearly erroneous" principle embodied in Rule 52 (a) of the Federal Rules of Civil Procedure. *Baumgartner v. United States*, 322 U.S. 665, 670-671; *Cufari v. United States*, 217 F.2d 404, 408.

and that the allegations of the complaint must be established by "clear, unequivocal, and convincing" proof. This rule was reaffirmed in *Baumgartner v. United States*, 322 U.S. 665, 670, where this Court again reversed a denaturalization decree because "the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen." Recent decisions have imposed this same heavy burden of proof upon the government in expatriation and deportation cases. *Nishikawa v. Dulles*, 356 U.S. 129; *Rowoldt v. Perfetto*, 355 U.S. 115; *Gonzales v. Landon*, 350 U.S. 920.

This Court has expressly held, moreover, that the government cannot satisfy its burden of proof in a denaturalization case when the defendant could reasonably have believed his alleged misrepresentations to be truthful. Squarely in point are the recent cases of *Nowak v. United States*, *supra*, and *Maisenberg v. United States*, *supra*. There petitioners were asked whether they believed in anarchy or belonged to any organization which taught or advocated anarchy or the overthrow of existing government in this country. In fact, they were not members of any anarchistic organization, but they were members of the Communist Party. This Court held that they could not be denaturalized for answering the question in the negative, because they might reasonably have interpreted it as referring solely to anarchistic organizations.

Precisely the same situation is present in this case. Petitioner was asked to state his "occupation" in May of 1925 and again in September of 1925. The

record establishes and the Court of Appeals concedes that he was then associated with the Koslo Realty Corporation and that he subsequently became president of this corporation (R. 250). The Court of Appeals referred to a real estate transaction which was conducted by the Koslo Realty Corporation in June of 1925, just one month after petitioner filed his preliminary form for naturalization and three months before he was formally admitted to citizenship (R. 250). The record also contains uncontradicted documentary evidence of two other real estate transactions handled by Koslo Realty Corporation during this period.

The Court of Appeals further found that petitioner could have interpreted the government's inquiry as relating to his legal occupation. It stated (R. 250-251):

"Surely it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some 'legal occupation.' "

If petitioner was actually engaged in the real estate business—and the record shows that he was—and if the government's inquiry could reasonably have been interpreted as calling for no more than petitioner's legal occupation—and the court below found that it could—then petitioner could not be guilty of wilful misrepresentation when he answered "real estate." The contrary conclusion of the court below is clearly inconsistent with this Court's decision in *Nowak and Maisenberg*.

The result reached below is likewise in conflict with several well-reasoned cases from other circuits. In *United States v. Kessler*, 213 F.2d 53, defendant

answered in the negative the following question in her preliminary form for naturalization:

"Have you ever been arrested or charged with the violation of any law of the United States or State or any city ordinances or traffic regulation?"

Defendant had been arrested no less than seventeen times on charges of "Obstructing highway," but each time she was released by the magistrate. The Court of Appeals, sitting en banc, held that this was not a predicate for denaturalization because there was no such offense as "Obstructing highway," and defendant was justified in believing that the naturalization form required information only as to valid arrests.

A similar result was reached in *Baghdasarian v. United States*, 220 F.2d 677, where defendant stated in the course of her naturalization proceedings that she had not belonged to any organizations other than "The Village Congregational Church" during the preceding ten years. The evidence showed that she had been enrolled as a member of the Communist Party by her husband during this period, that she later found a membership card with her name on it, and that she made no effort to dissociate herself from the Party, although she took no active part in it. Prior to trial she told an investigator of the Immigration and Naturalization Service that she had concealed her membership because she knew it would block her citizenship, but at trial she testified that she had denied membership because she did not consider herself a member. Under these circumstances, the Court of Appeals concluded that she lacked the intent requisite to membership in the Communist conspiracy and that she was under no obligation to disclose the existence of her Communist Party membership card.

The Third Circuit also refused to impose an affirmative duty of disclosure in *United States v. Minerich*, 250 F.2d 721. In December of 1927 defendant told two naturalization examiners that he had no criminal record. In February of 1928 he was arrested for disorderly conduct, released, and arrested again for criminal contempt. He was convicted of the latter charge on March 2, 1928. Seventeen days later he was admitted to citizenship. He was not interrogated again about his criminal record, and he did not disclose his intervening arrests and conviction. The court refused to hold that he had any duty of disclosure and unanimously reversed the denaturalization decree.

A final case of great significance is *Boufford v. United States*, 239 F.2d 841. There defendant was convicted under 18 U.S.C. § 1015(a) for making a false statement in his preliminary naturalization form. He stated that he had been married once, whereas in fact he had been convicted for going through a second and bigamous marriage ceremony. The Court of Appeals ruled that he could reasonably have interpreted this question as referring only to valid marriages, and it reversed his conviction because this issue had not been submitted to the jury.

Under the foregoing authorities, it was clearly not enough for the government to show that petitioner was engaged in the illicit purchase and sale of alcohol. It is obviously possible for persons engaged in the real estate business to be at the same time guilty of income-producing criminal conduct. If a real estate broker is guilty of larceny, embezzlement, forgery, tax evasion, or bootlegging, his "occupation" is still real estate. If he fills out a form which asks for his "occupation," he is not required to state "thief."

"embezzler," "forger," "tax evader," or "boot-legger." If the authorities want an exhaustive list of every income-producing activity in which he has been engaged during a specified period, they must so state. Otherwise, there can be no misrepresentation if he honestly states his principal legitimate occupation.

Here the record is clear that petitioner's principal legitimate occupation in 1925 was real estate. Indeed, the government has failed to prove by clear, convincing, and unequivocal evidence that real estate was not his principal occupation, legitimate or otherwise, during the crucial period. It has shown, at most, unlawful conduct of unspecified quantum and frequency. This is not enough to revoke a certificate of citizenship after thirty-five years.

II. No Inference May Be Drawn from Petitioner's Failure To Take the Stand

Petitioner did not elect to take the stand on his own behalf and the government did not call him as a witness. The Court of Appeals concluded that "the district court, though it did not do so, might properly have buttressed its findings by the unfavorable inferences to be drawn from the fact that Costello chose to remain off the witness stand . . ." (R. 248). It ruled that petitioner had no privilege to remain silent because he was not a criminal defendant, citing its prior decision in *United States v. Matles*, 247 F.2d 378, reversed on other grounds, 356 U.S. 256.

The Court of Appeals then proceeded to do what the District Court had not done. It stated that petitioner's failure to produce evidence of other real estate transactions by the Koslo Realty Corporation warranted the inference that there were no such trans-

actions (R. 250). It went on to state that while an applicant for citizenship might believe he was bound to disclose only his legal occupation, there was no evidence that petitioner so believed (R. 250-251). In other words, it concluded that petitioner's failure to take the stand warrants the inference that *he* understood the government's question as calling for disclosure of all income-producing activities, legal or illegal, although the question was plainly susceptible of a more restricted interpretation.

No other interpretation of the decision below is possible when it is compared with the case of *United States v. Profaci*, 274 F.2d 289, decided one month earlier by another panel of the Second Circuit. There defendant stated at the time of his naturalization that he had never been arrested; although he actually had a criminal record in Italy. The Court of Appeals reversed a decree of denaturalization on the ground that he could reasonably have interpreted the government's inquiry as relating solely to arrests in the United States, relying upon the *Nowak* and *Maisen-berg* decisions.

There is one distinction, and only one, between *Profaci* and this case. *Profaci* took the stand and testified as to his interpretation of the crucial question, whereas petitioner did not. These two cases, taken together, commit the Second Circuit to the proposition that a denaturalization defendant stands silent at his peril.

This proposition is contrary to the *Nowak* decision. There the trial court specifically referred to defendant's failure to take the stand in support of its denaturalization decree. 133 F. Supp. 191, 196. This Court, however, refused to infer from *Nowak*'s silence

that he must have understood the crucial question as referring to membership in the Communist Party.⁵ Absent any evidence as to how Nowak actually understood the question, this Court resolved the ambiguity in his favor.

The right of a denaturalization defendant to stand silent has been considered in two other cases. In the first denaturalization proceeding against petitioner, he was compelled to take the stand over his objection. Judge Palmieri filed an opinion, however, stating that he was in agreement with petitioner's assertion of privilege under the Fifth Amendment and was overruling it only to provide an adequate record for appellate review. - 144 F. Supp. 779.

Likewise, Chief Judge Clark expressed grave doubts in *Matles* as to the propriety of compelling a defendant to denaturalize himself. He concluded that "this important issue must of course await final settlement by the Supreme Court." 247 F.2d at 382. This Court, however, did not reach the issue because it ordered dismissal of the proceedings on the ground that the

⁵ The opinion states, 356 U.S. at 665, footnote 3:

"No evidence was introduced tending to show that Nowak actually understood Question 28 as calling for disclosure of his membership in the Communist Party. The Government argues that the requisite understanding of the question should be imputed to Nowak, 'an important functionary in the Party, and an intelligent man,' because of the fact that for some period prior to 1937 the deportation and exclusion statutes applied to aliens 'who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law'; Act of October 16, 1918, 40 Stat. 1012. The gap in the Government's proof cannot be filled in such tenuous fashion, especially in view of the citizenship provisions of the Nationality Act of 1906 referred to in the text."

affidavit of good cause had not been timely filed. 356 U.S. 256.

The issue thus left unresolved in *Matles* is again raised in this case. If it was definitively resolved in *Nowak*, the instant case was wrongly decided below. If it was not definitely resolved in *Nowak*, it should now be resolved in petitioner's favor.

The courts have repeatedly recognized the quasi-criminal character of denaturalization proceedings. *United States v. Minker*, 350 U.S. 179; *Schneiderman v. United States*, *supra*; *United States v. Genovese*, 133 F. Supp. 820, affirmed, 236 F.2d 757, certiorari denied, 352 U.S. 952; cf. *Abel v. United States*, 362 U.S. 217; *Jordan v. DeGeorge*, 341 U.S. 223, 231; *Gonzalez-Jasso v. Rogers*, 264 F.2d 584, 587.

It is settled, moreover, that the protection of the Fifth Amendment extends to certain non-criminal sanctions. In *Boyd v. United States*, 116 U.S. 616, this Court struck down a statute which compelled production of invoices for certain imports. The government sought only the forfeiture of the imports and not the conviction of the importers. This Court stated that such forfeiture proceedings, though civil in form, were criminal in nature, and further that no inference could be drawn from the importers' refusal to produce evidence which might subject their goods to forfeiture.

There is thus ample precedent for holding that a denaturalization defendant cannot be compelled to take the stand and that no inference may be drawn from his failure to testify. No other rule is consistent with the government's heavy burden of proof in denaturalization proceedings. If a denaturalization

defendant takes the stand in his own defense, he waives his privilege against self-incrimination. *Brown v. United States*, 356 U.S. 148. If an inference may be drawn from a denaturalization defendant's failure to take the stand, he is confronted with a grave dilemma. If he takes the stand, he can be compelled to incriminate himself; if he does not take the stand, he can be denaturalized on the basis of his silence. In both instances, the government is relieved of its heavy burden of proof.

The defendant's dilemma is particularly serious under the 1952 Act. The sole basis for denaturalization under present law also constitutes a criminal offense under 18 U.S.C. § 1015(a). The alternative between unfavorable inference and involuntary waiver becomes particularly harsh under these circumstances. And, as pointed out by Chief Judge Clark in *Matles*, the issue in many denaturalization proceedings is close to that involved in prosecutions under the Smith Act, 18 U.S.C. § 2385, or the Internal Security Act, 50 U.S.C. §§ 843, 855. 247 F.2d at 381.

These serious problems can only be avoided by compelling the government to prove its case by clear and convincing evidence, without resort to inferences drawn from the defendant's silence or to process for the purpose of compelling his testimony.

III. Due Process Precludes Denaturalization of Petitioner by Reason of Delay in the Institution of Suit

The Court of Appeals dismissed from consideration the long delay between naturalization and denaturalization in the opening paragraph of its opinion. It pointed out that this is "another of those troublesome denaturalization cases, instituted by the govern-

ment in an effort to have the court cancel a certificate of naturalization issued over thirty years ago" (R. 245-246). It further pointed out, however, that there was no applicable statute of limitations, and it regarded independent consideration of the defense of laches as foreclosed by *United States v. Summerlin*, 310 U.S. 414, 416.

Concededly a denaturalization proceeding is equitable in nature. Concededly also a court of equity will refuse relief on the ground of laches where there has been an unreasonable delay on the part of the moving party, resulting in detriment to the non-moving party.

Here there can be no question as to the element of delay. Petitioner was indicted in the Southern District of New York for conspiracy to violate the National Prohibition Act in 1925. The case went to trial in 1927, and the jury were unable to agree as to petitioner. Subsequently the case was dismissed on motion of the prosecution. Petitioner testified at length before a federal grand jury in the Southern District of New York in 1939, and there was again evidence of alleged bootlegging activities on his part. The United States Attorney had an obligation promptly to institute denaturalization proceedings, if in fact such activities constitute "good cause" therefor. Instead, the government waited for twenty-seven years after petitioner's indictment and thirteen years after his grand jury testimony.

Moreover, petitioner has clearly been prejudiced by this delay. The naturalization examiners who processed his petition for citizenship are dead; the witnesses who testified on his behalf are dead; the

judge who admitted him to citizenship is dead. The memories of the few witnesses still alive have been dimmed by the passage of more than thirty years. While it might at first be thought that this evidentiary attrition would operate only against the government, which has the burden of proof, the courts have recognized that it may operate against the defendant as well. Cf. *United States v. Irvine*, 98 U.S. 450, 452. Moreover, it is conceded that the government will seek deportation if the denaturalization decree is affirmed. Deportation would have been harsh punishment thirty years ago. Today, when petitioner is almost seventy years old, it approaches capital punishment in severity.

The only real issue thus centers around the availability of laches as a defense in proceedings instituted by the United States. Justice Story was the architect of this immunity from the defense of laches in the United States. He wrote two opinions which are still the leading authorities on the subject. *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373; *United States v. Kirkpatrick*, 9 Wheat. 720, 735. These opinions make it clear that the rule *quod nullum tempus occurrit regi* was adopted in this country for one reason, and one reason alone—to safeguard public property rights against the negligence and faithlessness of public servants. It was forged in England to protect the tangible prerogatives of royalty, and it was followed in the United States to protect the tangible prerogatives of democracy.

Every decision of the Supreme Court applying this rule, from the *Kirkpatrick* case down to the present time, has involved public property, public revenue, or

some similar public right.⁶ The overwhelming majority of the lower federal court decisions applying this rule likewise involve public property or pecuniary rights.⁷

⁶ These decisions fall in three broad categories. The first category embraces suits on surety bonds. See *United States v. Mack*, 295 U.S. 480; *United States v. Beebe*, 180 U.S. 343; *United States v. Thompson*, 98 U.S. 486; *Gaussen v. United States*, 97 U.S. 584; *Hart v. United States*, 95 U.S. 316; *Jones v. United States*, 18 Wall. 662; *United States v. Boyd*, 15 Pet. 187; *United States v. Knight*, 14 Pet. 301; *Smith v. United States*, 5 Pet. 292; *Dox v. Postmaster General*, 1 Pet. 318; *United States v. Nicholl*, 12 Wheat. 505; *United States v. Vanzandt*, 11 Wheat. 184.

The second category involves title to public lands. See *United States v. California*, 332 U.S. 19; *United States v. Northern Pacific R. Co.*, 314 U.S. 317; *Stanley v. Schwalby*, 147 U.S. 508; *San Pedro & Canon del Agua Co. v. United States*, 146 U.S. 120; *United States v. Dalles Military Road Co.*, 140 U.S. 599; *Redfield v. Parks*, 132 U.S. 239; *United States v. Insley*, 130 U.S. 263; *United States v. Beebe*, 127 U.S. 338; *United States v. Minor*, 114 U.S. 233; *Simmons v. Ogle*, 105 U.S. 271; *Armstrong v. Morrill*, 14 Wall. 120; *Gibson v. Chouteau*, 13 Wall. 92.

The third category involves miscellaneous monetary claims by the federal government. See *United States v. Summerlin*, 310 U.S. 414 (claim against decedent's estate); *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126 (title to bank deposit); *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123 (dividends on stock owned by United States); *United States v. Michigan*, 190 U.S. 379 (money furnished to state for canal); *United States v. Nashville, Chattanooga & St. Louis R. Co.*, 118 U.S. 120 (interest on securities owned by United States); *Steele v. United States*, 113 U.S. 128 (proceeds of government materials sold to third parties); *Fink v. O'Neil*, 106 U.S. 272 (enforcement of judgment in favor of United States); *Cooke v. United States*, 91 U.S. 389 (liability on forged government securities).

⁷ *United States v. Sharp*, 216 F.2d 602 (suit on a promissory note); *Woods v. Wayne*, 177 F.2d 559 (suit to recover rent overcharges); *United States v. First National Bank of Prague, Okl.*, 124 F.2d 484 (suit against guarantor of forged endorsement on government check); *United States v. Czarnikow-Rionda Co.*, 40 F.2d 214, certiorari denied, 282 U.S. 844 (suit to recover demurrage).

This result is dictated by considerations of policy as well as of precedent. It is settled that the *nullum tempus* rule is a rule of public policy and will be applied only when it serves the interest of public policy. The most authoritative exposition of this principle is found in the case of *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, where this Court held that foreign sovereignties are not immune from limitations or from laches. Chief Justice Stone stressed that the *nullum tempus* rule is narrowly restricted to those cases where public policy dictates its application.

In cases of this nature, involving the liberty of the individual citizen, it is clear that the *nullum tempus* rule does not serve public policy. A denaturalization proceeding, although civil in form, is far closer to a criminal prosecution than to the ordinary civil suit brought by the government for the protection of public property rights. Unreasonable delay in criminal cases requires dismissal of the prosecution.⁸ The policy which protects a citizen from criminal prosecution after time has sealed the lips of his witnesses must also protect him from loss of citizenship under the same circumstances.

It is instructive to note that when Justice Story enunciated "the great public policy of preserving the public rights, revenues, and property" from loss by limitations or laches, this nation had long been committed to the greater public policy of protecting the citizen from prosecution for stale offenses. When the *Hoar* and *Kirkpatrick* cases were decided, not even

⁸ *Petition of Provoe*, 17 F.R.D. 183, affirmed, 350 U.S. 857; *Williams v. United States*, 250 F.2d 19.

treason could be prosecuted after a lapse of three years. Act of April 30, 1790, c. 9, §32, 1 Stat. 119. These two public policies can only be reconciled by confining the one to public property and the other to personal liberty.

Any other solution makes it inevitable that denaturalization proceedings will be motivated by post-naturalization conduct. It can scarcely be supposed that the government is seeking petitioner's denaturalization today on account of matters which it has known for more than thirty years. The real reason behind the government's complaint must lie in some supposed misconduct, neither alleged nor proved, which occurred *after* petitioner's naturalization. The government is thus in effect attaching a penalty to conduct by a naturalized citizen which it could not attach to similar conduct by a native-born citizen. *Trop v. Dulles*, 356 U.S. 86.

Denaturalization under these circumstances is inconsistent with the concept of due process. Whatever might be the case when the conduct relied upon to support denaturalization does not come to the attention of the authorities, due process precludes denaturalization under the circumstances of this case. The application of the *nullum tempus* rule in this case violates petitioner's constitutional rights. The protection of the due process clause must be broad enough to prevent denaturalization when the government takes no action for decades after discovery of the allegedly disqualifying facts, and, in the interim, death deprives the citizen of testimony which might vindicate his citizenship.

IV. A Decree of Denaturalization Cannot Rest upon Evidence Tainted by Wiretapping

Both the trial court and the Court of Appeals relied heavily upon certain statements by petitioner to support their finding that his true occupation was bootlegging. These statements consisted of testimony given by petitioner before a New York State grand jury and also before a referee appointed by the Appellate Division of the New York State Supreme Court. This testimony was admitted over petitioner's objection that it was tainted by wiretapping. It is petitioner's position that this testimony must be excluded from consideration in determining the sufficiency of the government's evidence, because the record shows that it was in fact the fruit of illegally intercepted communications.

In the prior denaturalization proceedings against petitioner, the affiant of good cause testified that he based his affidavit upon four sources: petitioner's testimony before the New York State grand jury, petitioner's testimony before the Appellate Division referee, petitioner's testimony before the Kefauver Committee, and a so-called central office file of the Immigration and Naturalization Service. Government counsel declined to permit inspection of the central office file on the ground that it was "confidential." Judge Palmieri found that the remaining three sources "indicate on their face that wiretaps were extensively used and that there were innumerable wiretaps" and that these wiretaps "clearly vitiated the alleged admissions in the aforementioned hearings by the defendant from the standpoint of their use as evidence," citing *United States v. Goldstein*, 120 F.2d

485, affirmed, 316 U.S. 114, and *Leary v. Deuno*, 347 U.S. 556, 561.⁹

The Court of Appeals reversed Judge Palmieri's decision, holding that the government should have been permitted to file a new affidavit of good cause; that the court should have given the government an opportunity to demonstrate that it had sufficient untainted evidence, that the fruit of wiretaps antedating the Communications Act of 1934 is admissible, and that the fruit of wiretaps by state officers, if obtained without federal connivance, is similarly admissible.¹⁰ The government also urged very strenuously that petitioner's testimony was not in fact the fruit of wiretaps,¹¹ but Chief Judge Clark explicitly rejected this argument *in limine*, stating, 247 F.2d at 385-386:

"The moving papers included extracts from the defendant's testimony before a New York County Grand Jury in 1942; before a referee appointed by the New York State Appellate Division, First Department, in 1943 in regard to disciplinary proceedings against Attorney Thomas A. Aurelio; and before the Special (Kefauver) Committee of the United States Senate to Investigate Organized Crime, which held hearings in 1950 and 1951. These transcripts suggested that state officers had indeed tapped the defendant's phone in 1943, as a

⁹ The quoted language is taken from Judge Palmieri's oral opinion in the first trial of this action. Civil No. 79-309, September 28, 1956 (unreported decision). This opinion was printed at pp. 102a-103a in the record filed in this Court with petitioner's petition for writ of certiorari in *Castello v. United States*, 356 U.S. 256, (No. 49), October Term, 1957).

¹⁰ This opinion was handed down on July 22, 1957. This Court did not decide the case of *Benanti v. United States*, 355 U.S. 96, until December 9, 1957.

¹¹ Brief for Appellant, pp. 41-51, *United States v. Castello*, 247 F.2d 384.

result of which he testified before the three bodies to facts which he might not otherwise have revealed. (Emphasis added.)

Thus the precise argument relied upon by Judge Dawson to sustain the admissibility of petitioner's testimony was once rejected by the Court of Appeals. The subsequent action of this Court was based upon entirely different grounds and does not affect the persuasiveness of this rejection.

Moreover, the exhibits themselves lend cogent support to Chief Judge Clark's conclusion. In the course of petitioner's interrogation before the New York State grand jury, District Attorney Hogan actually *quoted* no less than forty-eight of petitioner's intercepted conversations.¹² Mr. Hogan made it perfectly clear, moreover, that these forty-eight conversations were only a small fraction of the total number of conversations intercepted by his office. He referred to "dozens" of conversations between petitioner and one Erickson; to one hundred and thirty conversations between petitioner and one Moretti during a five month period; to "at least a dozen" conversations between petitioner and Moretti subsequent to this period; and to fifty intercepted conversations between petitioner and one Offner.¹³ Mr. Hogan him-

¹² Gov't Ex. 3; Supplemental Record pp. 15-16, 18, 19-20, 21, 22, 23, 24, 25, 27, 28, 29, 32, 34, 35-36, 37, 46, 48, 49-50, 51, 53, 57, 58, 59, 62, 63-64, 65-67, 67, 69, 70, 95-96, 96-96-97, 99, 102, 104, 122, 123, 124 (two conversations), 124, 125, 126, 127-128, 128, 132, 139, 141, 142, 143, 149.

¹³ *Id.* at 99, 121, 122, 141. While Mr. Hogan testified in the present proceedings that information concerning some of the Moretti calls was obtained from the telephone company, this was never brought out before the grand jury (R. 30; R. 97).

self admitted in the court below that he confronted petitioner with intercepted conversations "whenever his memory seemed to fail, to refresh it" (R. 50).

One of the intercepted conversations actually quoted by Mr. Hogan was a conversation between petitioner and one James O'Connell, who was prosecuted with him in 1925 for violation of the National Prohibition Act.¹⁴ How many other conversations with O'Connell may have been intercepted does not appear from the record. While the quoted conversation did not in terms refer to prohibition violations, it is highly significant that *on the very page after this conversation was read into the record* came petitioner's first admission that he had been in the bootlegging business during the 1920's and that O'Connell had been employed by him.¹⁵

A few days after petitioner's appearance before this grand jury, he testified before a referee appointed by the Appellate Division in connection with a related investigation (Gov't Ex. 2). Mr. Hogan made frequent references to petitioner's grand jury testimony,¹⁶ and if this testimony is tainted the Appellate Division testimony must inevitably share the taint. Moreover, Mr. Hogan again made repeated reference to the inter-

¹⁴ Id. at 102.

¹⁵ Id. at 103.

¹⁶ Gov't Ex. 2; Supplemental Record pp. 162, 176, 180, 183, 187, 188, 191, 193, 203, 222, 226, 230, 235, 239, 261, 263, 265.

cepted conversations themselves.¹⁷ Several of the conversations were again quoted verbatim.

The conclusion is irresistible that petitioner testified so fully and so freely concerning facts so incriminating only because he believed that his past history was an open book to the District Attorney by virtue of these interceptions, the full extent of which was not revealed to him until long afterward. Mr. Hogan now testifies that he can recall nothing in the intercepted conversations which related to petitioner's activities before 1930 (R. 46), but he was careful not to apprise petitioner of this fact, if it is a fact, at the time of his interrogation. Petitioner would certainly have been justified in assuming that, if the District Attorney's transcriptions included conversations with one of his co-defendants in the 1925 prohibition prosecution, anything less than full confession would be worse than useless. Judge Dawson relied very heavily upon Mr. Hogan's interrogation of petitioner precisely because it contained facts and details not contained in petitioner's testimony on other occasions, when he was not confronted with countless intercepted conversations. It would be the height of naïvete to suggest that the confrontation and the confessions were mere coincidence.

Since both the law and the facts must be construed most favorably to the defense in a denaturalization case, by parity of reasoning any doubt as to the admissibility of evidence should likewise be resolved in favor of the defense. A decree of denaturalization

¹⁷ Id. at 179, 183, 186, 191, 193-194, 195, 229.

¹⁸ Id. at 197-198, 260.

should not rest upon evidence of dubious admissibility, any more than it should rest upon evidence of dubious credibility. In determining whether the government's proof complies with the standards laid down in *Nwach* and *Maisenberg*, petitioner's testimony before the state grand jury and the court referee must be excluded from consideration.

V. The Present Proceedings Are Barred by Dismissal of Prior Proceedings with Prejudice

Petitioner has moved for leave to amend the petition for certiorari by adding an additional question, namely, whether the present proceedings are barred by dismissal of prior proceedings with prejudice. On May 16, 1960, this Court postponed consideration of the motion and ordered it consolidated for argument with *United States v. Lucchese*, No. 57, October Term, 1960. Since petitioner will have no other opportunity to present a brief on this issue, a short statement of his position is included herein.

In dismissing the prior denaturalization proceedings against petitioner, Judge ~~Polmeri~~ ^{Polmeri} expressly provided that the case was dismissed "without prejudice to the Government's initiating it anew on the very same grounds." 145 F. Supp. at 897. The Court of Appeals reversed but was in turn reversed by this Court, which held that an affidavit of good cause is a prerequisite to the initiation of denaturalization proceedings and that the affidavit must be filed with the complaint. This Court remanded the case to the District Court with directions "to dismiss the complaint." 356 U.S. at 257.

On May 31, 1958, Judge McGohey signed an order which "Ordered, Adjudged and Decreed that plaintiff's complaint be and the same hereby is dismissed."

Although the government had presented an order for dismissal "without prejudice," Judge McGlothy signed an order in accordance with his understanding of the mandate of this Court. The government *took no appeal from the order as entered.*

This case and the *Lucchese* case were companion cases in this Court, reversed with identical directions. As in this case, the District Court felt constrained to enter an order of dismissal in the *Lucchese* case which did not specify whether it was with or without prejudice. The government, however, elected to prosecute an appeal which was dismissed on October 15, 1959. This Court granted certiorari to review the order of dismissal.

The central issue in both cases is the scope and effect of Rule 41(b) of the Federal Rules of Civil Procedure. This rule provides that an involuntary dismissal operates as an adjudication upon the merits and bars further proceedings upon the same cause of action except in three stated instances: where the order recites that it is without prejudice, where dismissal is for lack of jurisdiction, or where dismissal is for improper venue. Thus dismissals for failure to prosecute,¹⁹ for failure to comply with an order of court,²⁰ and for failure to state a cause of action²¹ all operate to bar further proceedings upon the same cause of action unless the order otherwise specifies.

¹⁹ *Edmund v. Moore-McCormack Lines*, 253 F.2d 113, certiorari denied, 358 U.S. 818; *Garden Homes v. Mason*, 249 F.2d 71, certiorari denied, 356 U.S. 963; *Reynolds v. Wabash Railroad Co.*, 236 F.2d 387.

²⁰ *United States v. Procter & Gamble Co.*, 356 U.S. 677; *Moonen v. Central Motor Lines*, 222 F.2d 572.

²¹ *Brazier v. Great Atlantic & Pacific Tea Co.*, 256 F.2d 967; *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 172 F.2d 601, certiorari denied, 337 U.S. 939.

* In instances where the plaintiff is aggrieved by a dismissal under Rule 41(b), the appropriate remedy is to appeal from the judgment of dismissal and not merely to institute the proceedings anew.²² The applicability of this principle is not affected by the fact that here the dismissal occurred after the present complaint had been filed. Where two actions are based upon the same claim, the dismissal of one operates as an adjudication upon the merits of the other. *Kuzma v. Bessemer & Lake Erie Railroad*, 259 F.2d 456.

None of the exceptions set forth in Rule 41(b) apply to this case. The filing of an affidavit of good cause is not a condition precedent to the acquisition of jurisdiction by the court. In *United States v. Failla*, 164 F. Supp. 307, the affidavit was not filed until after the proceedings were instituted, but the defendant entered no objection until six months after the entry of judgment against him. In denying his motion to vacate this judgment and dismiss the complaint, the court ruled that it had jurisdiction to enter the original judgment despite the untimely filing of the affidavit.

To the same effect is the decision of the Ninth Circuit in *Title v. United States*, 263 F.2d 28, 30, certiorari denied, 359 U.S. 989. There the District Court denied defendant's motion to dismiss on the ground that the government had at no time filed an affidavit of good cause, and the Court of Appeals dismissed his appeal for failure to prosecute. Two years later, defendant moved to vacate the original judgment and to dismiss the complaint, relying upon the decision of this Court in *Matles, supra*. In affirming the denial of

²² *United States v. Procter & Gamble Co., supra*; *Ma Chuck Moon v. Dulles*, 237 F.2d 241, certiorari denied, 352 U.S. 1002; see also *Berman v. Thomas*, 41 Ariz. 457, 19 P. 2d 685.

these motions; the Court of Appeals held that an affidavit of good cause is not a jurisdictional prerequisite to denaturalization proceedings and that the original judgment was in any event *res judicata*.

The two remaining exceptions set forth in Rule 41(b) are equally inapplicable. The prior proceedings were certainly not dismissed for improper venue, and the order of dismissal did not "otherwise specify" within the meaning of the rule.

The District Court concluded that the prior denaturalization proceedings were dismissed on jurisdictional grounds, and hence that the case came within one of the stated exceptions to the rule (R. 34-35). The Court of Appeals rested its decision upon far broader grounds. It agreed with petitioner that the case did not come within any of the stated exceptions to the rule, but concluded that dismissals entered pursuant to the mandate of a higher court constitute an unstated exception to the rule.

The Court of Appeals cited neither decisions nor legislative history in support of this construction. It concluded that the intention of all courts concerned would be violated and that pure technicalities would be exalted if the prior proceedings were held to bar a second denaturalization proceeding.

Like most rules of law created to suit the exigencies of a particular case, this unwritten exception to Rule 41(b) is bad law. It will play havoc with literally thousands of dismissals entered pursuant to the mandate of a higher court. Surely the Court of Appeals cannot mean that every dismissal entered pursuant to the mandate of a higher court is *without prejudice* unless it otherwise states. Nor can the Court of Appeals mean that a dismissal entered pursuant to the mandate

of a higher court is with prejudice unless it otherwise states or unless the intention of all the courts concerned would be violated by construing it as a dismissal with prejudice. Rule 41(b) was designed to avoid such exercises in judicial mind reading. If it is held inapplicable to dismissals pursuant to the mandate of a higher court, a chasm of chaos opens up in this field.

Even if we accept the subjective test enunciated by the Court of Appeals, it is far from clear that the courts intended the prior dismissal to operate without prejudice. The situation is entirely different from that presented by *United States v. Zucca*, 351 U.S. 91, where the District Court granted defendant's motion to dismiss for failure to file the affidavit of good cause contemporaneously with the complaint and entered an order of dismissal without prejudice, which was subsequently affirmed by the Court of Appeals and by this Court. There defendant was never put to the burden of a trial on the merits.

In this case the District Court denied petitioner's motion to dismiss for failure to file the affidavit of good cause contemporaneously with the complaint. Petitioner was then put to the burden of preparing for a trial on the merits. After four days of trial the case was dismissed. Petitioner was then put to the further burden of defending this dismissal in the Court of Appeals. He then elected to file a petition for certiorari in this Court. Almost six years elapsed before this Court ruled that the proceedings were fatally defective because the affidavit of good cause was not timely filed. The government has now forced petitioner to a second trial in the District Court, a second appeal to the Court of Appeals, and a second petition for certiorari. The second case has already lasted for more than two years. For the last eight years, petitioner has been engaged in the active defense of his citizenship.

Of course petitioner is willing to devote his remaining years and resources to this cause. The question is whether the government should thus deal with any citizen. It was through no fault of petitioner that the government failed to file its affidavit until too late and that the District Court erred in denying his timely motion to dismiss on this ground. It was through no fault of petitioner that he was forced to stand trial and to exhaust his appellate remedies in a proceeding which was in fact a nullity. The government, not petitioner, was in error.

Under these circumstances, it is not unreasonable to conclude that this Court meant what it said when it ordered the proceedings "dismissed." After long years of litigation, the interests of justice are best served here by a final termination of the proceedings. This result can be accomplished by applying the plain language of Rule 41(b) to the dismissal entered pursuant to the mandate of this Court.

CONCLUSION

For the foregoing reasons, petitioner urges that the judgment of the court below should be reversed and the case dismissed with prejudice.

Respectfully submitted,

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No. 59

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT AND ON MOTION TO
AMEND THE PETITION FOR A WRIT OF CERTIORARI**

BRIEF FOR THE UNITED STATES

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No. 59

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 245-255) is reported at 275 F. 2d 355. The opinion of the District Court (R. 17-43) is reported at 171 F. Supp. 10.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1960 (R. 255-256). The petition for a writ of certiorari was filed on March 18, 1960, and the motion to amend the petition was filed on April 15, 1960. On May 16, 1960, the petition was granted

and the motion was assigned for hearing.¹ The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are presented on the writ of certiorari:

1. Whether the evidence is sufficient to establish that petitioner wilfully and falsely misrepresented a material fact—his occupation—during his naturalization proceedings.

2. Whether the government should have been barred from instituting this denaturalization proceeding against petitioner by the lapse of time since naturalization.

3. Whether some of petitioner's admissions as to his true occupation at the time of naturalization were tainted by wiretapping.

The following questions are presented by the motion for leave to amend the petition for a writ of certiorari:

4. Whether petitioner should be permitted to amend his petition for a writ of certiorari so as to raise belatedly the issue of *res judicata* which he contested before both lower courts but chose not to set forth in his original petition.

5. Whether a second denaturalization proceeding is barred by the failure of the District Court to specify, in the order dismissing the original denaturalization complaint, that the dismissal is without prejudice to

¹ The hearing on the motion is to be consolidated with the argument on the merits in *United States v. Lucchese*, No. 57, this Term.

the filing of a new complaint, where the dismissal was entered at the direction of this Court for failure to file the affidavit of good cause with the complaint.

STATUTE AND RULES INVOLVED

8 U.S.C. 1451 (Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 68 Stat. 1232) provides in part, as follows:

(a) *Concealment of material evidence; refusal to testify.*

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *

* * * * *

(i) *Applicability of certificates of naturalization and citizenship.*

The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to

any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

Rule 12(b) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

(b) How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.

* * *

Rule 41(b) of the Federal Rules of Civil Procedure provides:

(b) Involuntary dismissal: Effect thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his

evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

* * * * *

STATEMENT

On May 1, 1958, the United States filed a denaturalization complaint (together with affidavits of good cause) against petitioner in the United States District Court for the Southern District of New York (R. 3-14). Following trial without a jury, the District Court vacated the court order admitting petitioner to citizenship and cancelled the certificate of naturalization issued pursuant thereto (R. 17-44). On appeal, the Court of Appeals affirmed.²

² The government had filed an earlier denaturalization complaint against petitioner on October 22, 1952, under 8 U.S.C. (1946 ed.) 738(a), the predecessor of the statute upon which this proceeding is founded. The District Court granted peti-

1. *The evidence of fraud.*

The government's complaint alleged that the order admitting petitioner to citizenship on September 10, 1925, and the certificate of naturalization had been "procured by the concealment of material facts and by wilful misrepresentation." Specifically, the complaint alleged that petitioner had sworn on three separate occasions (in his preliminary form for petition for naturalization, during his oral testimony before a naturalization examiner, and in his petition for naturalization) that his occupation was "real estate," whereas his actual occupation was the illicit

petitioner's motion to dismiss the earlier complaint and to strike the affidavit of good cause, without prejudice to a renewal of the proceedings, on the ground that both the government's affidavit of good cause (which was filed somewhat after the complaint was filed) and its evidence were seriously tainted by wiretapping. *United States v. Costello*, 145 F. Supp. 892 (S.D.N.Y.). On appeal, the Court of Appeals reversed, holding that the government should have been given an opportunity to establish that its evidence was untainted or otherwise admissible. *United States v. Costello*, 247 F. 2d 384 (C.A. 2). This Court granted the petition for a writ of certiorari and reversed, *per curiam*, on a ground not considered below—that the filing of the affidavit of good cause contemporaneously with the denaturalization complaint was a prerequisite to the institution of the suit (R. 17-18; *Costello v. United States*, 356 U.S. 256 (No. 494, O.T. 1957); see *Lucchese v. United States*, 356 U.S. 256 (No. 450, O.T. 1957); *Matles v. United States*, 356 U.S. 256 (No. 378, O.T. 1957)).

After remand, the government presented to the District Court a proposed order for dismissal "without prejudice." The District Court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (R. 252-253).

purchase and sale of alcohol (R. 4-5); and that petitioner, in his petition for naturalization, had sworn that he would support and defend the Constitution and laws of the United States, whereas he was at that very time violating the laws of the United States by engaging in the illicit purchase and sale of alcohol (R. 5).

At the trial, there was no question that petitioner consistently claimed, during the preliminary naturalization process, that his occupation was "real estate" (Govt. Ex. 7-9), and that this process resulted in his naturalization (Govt. Ex. 9; R. 205). The evidence showing that petitioner was actually engaged in the illegal liquor traffic before and at the time of his naturalization may be summarized as follows:

During the period 1921-1923, petitioner worked for Emanuel Kessler who, until he received a 2-year sentence for violation of the National Prohibition Act, was engaged in the illegal importation of alcoholic beverages from Europe (R. 59-61). Kessler's boats would land about 500 cases of illicit liquor, each night, somewhere on Long Island, New York (R. 60-61). Petitioner and his brother, Edward Costello, were employed by Kessler to meet the boats and truck the liquor to hiding places for storage—either in a garage behind Edward Costello's home on Halsey Street, Long Island City, or in an old mansion in Long Island City which petitioner and his brother had purchased (R. 62-65, 69, see 70-72, 74, 76). Kessler would contact petitioner or Edward daily at their office, 405 Lexington Avenue, New York City, to arrange a meeting place for each night's activity

(R. 52-56, 58, 62-63, 76). The Costellos received about \$6,000 each week from Kessler for their hauling and storage service (R. 65, 76-77). When Kessler went to jail in 1923, petitioner asked him "for some money so he could continue on." Kessler gave petitioner "either 100 or 200 cases" of liquor for that purpose (R. 68, 73).

During the period prior to December 1923, petitioner and his brother also stored liquor for Albert Feldman and bought and sold illegal liquor on their own account (R. 168-174). Occasionally petitioner would accept small lots of merchandise from Kessler in partial payment of the storage charges (R. 66). He disposed of 500 cases of liquor supposedly being stored for Kessler (R. 66-67, 175-176), 1,000 cases of liquor which he was holding on consignment for Feldman (R. 171-174), and he somehow reacquired from the government about \$250,000 worth of Kessler's whiskey seized in a raid on petitioner's mansion-warehouse (R. 67-68). Petitioner, not Edward Costello, was "the business man" for their partnership (R. 176, see R. 73).

In the fall of 1925, petitioner and Harry Sausser (one of petitioner's character witnesses in his naturalization proceeding, see Govt. Exs. 7, 9, R. 201, 204) went to Frank Kelly, who was engaged in the importation of illegal liquor, and arranged to have several thousand cases of liquor transferred from a ship at sea to Kelly's vessel, an ocean-going schooner which was laying 100 miles off Long Island (R. 81-86, 93). The plan was to land the liquor in smaller boats at a later time (R. 85-87). In December 1925, peti-

tioner and Kelly employed Philip Coffey (who had originally arranged their introduction (R. 83)) to land the liquor stored on board Kelly's schooner (R. 152). Coffey was paid by petitioner's bookkeeper (R. 155, 158, 162).

Late in 1924 or early in 1925, Sausser became associated with petitioner, an association which continued until Sausser's death in 1926 (R. 113-116, 123). Petitioner and Sausser were heard to discuss the business aspects of "bootlegging," such as the type of whiskey to be purchased and the price to be paid (R. 120). Sausser's daughter (Helen Sausser) visited the Lexington Avenue office used by petitioner and her father on three or four occasions. Although "supposedly a real estate office," this location was actually the base of operations for their dealings in illicit alcohol (R. 116-117, 123, 131-134).

On July 20, 1938, in a statement given to James M. Sullivan, Special Agent of the Treasury Department, petitioner said that he had been in the liquor business "from 1923 or 1924 until about a year or two before Repeal". (R. 177-178).

In testimony before a federal grand jury on August 24, 1939, petitioner admitted that he had done "a little bootlegging," the last time around 1926 (R. 179-180).

In 1943, in testimony before a New York state grand jury and before a referee appointed by the Appellate Division of the Supreme Court of New York, petitioner stated that he had smuggled illegal alcohol into this country during prohibition and re-

ceived large sums of money from this activity (R. 184-185). During the period 1919 to 1932, petitioner reported an income of \$305,000. Most of this income came from his illicit alcohol traffic (R. 187-188, 190-191). Petitioner made about \$20,000-\$25,000 in one real estate transaction during this time, using funds derived from "gambling or liquor" to finance the operation (R. 188-189).³

On February 15, 1947, while testifying before the New York State Liquor Authority, petitioner stated that he had engaged in bootlegging from 1923 to 1926 or 1927, that his headquarters was at 405 Lexington Avenue, and that his Canadian representative was Harry Sausser (R. 194-196).

A search of the records of the boroughs of Manhattan, Brooklyn, Queens, and the Bronx revealed that in 1922 petitioner purchased a piece of property in Queens from the Halsey Realty Corporation and conveyed it to his wife, Loretta B. Costello, in 1923

³ Pursuant to the order of a New York state court, petitioner's telephone communications were intercepted during the period May 7, 1943 to November 1943. The grand jury interrogation was "precipitated" by a conversation between petitioner and a New York state judge, in the sense that "there would have been a grand jury interrogation [of petitioner] in any event, but the [intercepted] conversation * * * made necessary questioning at the time it took place" (R. 47, 49-52). However, no information relating to petitioner's activities before 1930 was derived from these wiretaps (R. 46), none of the interrogation regarding pre-1930 activity was based on or derived from wiretapping, and petitioner was not led to believe that the interrogator had learned of his earlier activities through wiretapping (R. 47-48). Petitioner was interrogated regarding his pre-1930 pursuits solely for the purpose of background (R. 51).

(R. 94-95, 201; Govt. Ex. 7). In 1924, the Koslo Realty Corporation purchased property in New York City and sold it on June 23, 1925 (R. 95, 99).⁴ A purchase money mortgage on this property was released on December 21, 1925, and petitioner signed the release as president of the Koslo Realty Corporation (Govt. Ex. 25, R. 225-226). The Koslo Corporation also purchased several lots in the Bronx on August 12, 1925 (Govt. Exs. 19, 20, R. 209-212) and sold them on June 22, 1926 (Def. Ex. C, R. 231-232); purchased land in the Bronx from the Claire Building Corporation on October 26, 1925 (Govt. Exs. 21, 22, R. 213-216), and sold it to the R. G. & F. Corporation on July 15, 1926 (Def. Exs. A, B, R. 227-230). These latter transactions, however, were initiated several months after petitioner filed his petition for naturalization on May 1, 1925 (Govt. Ex. 9, R. 204).

2: *The holding of the District Court.*

a. The District Court found that the evidence was "clear, unequivocal and convincing" that petitioner had procured his order of naturalization, by wilful misrepresentation of material facts and by fraud, in that he had stated his occupation was real estate, while his true occupation was bootlegging, and that he swore in his oath of allegiance to support and defend the Constitution and laws of the United States, while at the time he was actually engaged in violating the Constitution and laws of this country (R. 21-22, see R. 33). The District Court summarized much of the

⁴ Apparently this was the beginning of the transaction referred to by petitioner when he testified before the New York grand jury in 1943 (R. 95, 188, Govt. Ex. 18, R. 208).

evidence set forth above to support its conclusion (R. 23-26), noting that "[i]f the Government rested on the testimony of the individual witnesses it might be necessary to appraise their evidence more carefully, but in view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto he was engaged in bootlegging, the testimony of the individual witnesses is, if anything, merely cumulative" (R. 26).

With specific reference to the question of whether petitioner was actually occupied in real estate, or could reasonably think that such an answer was an honest answer to the question asked regarding occupation, the District Court pointed out (R. 27) that:

* * * prior to the time that Costello had sworn that his occupation was "real estate" he personally had engaged in only one real estate transfer in his own name; and the [Koslo] corporation in which he was a principal engaged in only one transaction and that to the extent of purchasing one parcel of real estate. During the same period, * * * he was actively engaged in bootlegging on a large scale and with very profitable results. * * * The term "occupation" would commonly be understood to refer to the income producing activity to which a person devotes the major portion of his time and from which he derives the major portion of his income. * * * Obviously if he were engaged in an illegal occupation the Government would like to know that to determine whether he properly should be admitted to citizenship. Costello, confronted with the question and the fact that his occupation was an illegal one, had one

of two choices in giving his answer. If he had told the truth he would have said that his occupation was bootlegging; his application for citizenship would then have been denied.⁵ When he answered that his occupation was real estate he was giving a false and misleading answer and was therefore engaging in a willful misrepresentation in order to secure his naturalization certificate.

b. The trial judge rejected petitioner's contention that his admissions as to his prior occupation as a dealer in illicit alcohol were tainted by wiretapping, finding that the government did not learn anything regarding his activities in violation of the prohibition laws from or as a result of wiretapping. Although state officers intercepted petitioner's telephone communications in 1943, and the New York grand jury interrogation took place when it did because of what was thus learned, petitioner's testimony as to his bootlegging activities was elicited for the purposes of background only and was collateral to the purposes of the interrogation (R. 39-42). See fn. 3, *supra*, p. 10. The trial judge concluded that "[t]he evidence received in this case was not wiretap evidence nor was it the fruit of wiretap evidence" (R. 42).

c. The District Court also expressly rejected defense counsel's contention that the dismissal of the

⁵ On the question of the materiality of the misrepresentation, the District Court elsewhere noted (R. 22-23) that the judge who admitted petitioner to citizenship in 1925 had, in 1926, denaturalized a person who, during the five years preceding his naturalization, had been convicted of violating the prohibition laws. See *United States v. Mirsky*, 17 F. 2d 275 (S.D. N.Y.).

prior denaturalization proceeding barred the present proceeding, holding that the earlier action was dismissed for failure by the government to comply with what the trial judge regarded as a jurisdictional requirement—contemporaneous filing of an affidavit of good cause and the complaint for denaturalization (R. 34-35).

3. *The ruling of the Court of Appeals.*

a. The Court of Appeals did not pass upon the District Court's second ground for decision on the merits (that petitioner falsely swore that he would support and defend the Constitution and laws of the United States), holding that the charge of wilful misrepresentation and fraud was amply supported by the evidence of petitioner's false statements regarding his occupation (R. 251-252). It said (R. 250-251):

Of course one has to begin a new occupation at some point of time, and at the outset there necessarily is not a great deal of evidence as to such activity. The evidence relating to Costello's real estate dealings is at best scanty.

* * * If there was any further evidence along this line [as to real estate transactions], it would be peculiarly within the knowledge of Costello, and his failure to produce evidence of such activity warrants the inference that there was none such.

We think it obvious that a worldly-wise man such as Costello must have realized that his real occupation was bootlegging and that his dabbling in real estate was but "dust in the eyes" to conceal his real occupation. * * * Surely it is conceivable that an applicant might believe that the answer called for no more than a dis-

closure of some "legal occupation". There is no evidence in the record that Costello so believed. * * *

b. The Court of Appeals also concluded that the dismissal of the prior complaint was not a judgment on the merits for the purposes of Rule 41(b), *supra*, pp. 4-5. It reasoned that this Court, in directing a dismissal in *Costello v. United States*, 356 U.S. 256, *supra*, pp. 5-6, fn. 2, "did not suppose that it was directing a determination on the merits," since in both *Costello* and *United States v. Zucca*, 351 U.S. 91, the dismissals originally ordered by the District Court were dismissals without prejudice (R. 254, see 252-254). The Court of Appeals pointed out that the District Court, considering that it was bound by the terms of the mandate merely to dismiss the complaint, did not determine that its dismissal on remand should be regarded as a judgment on the merits and did not purport to exercise any discretion (R. 253-254). The appellate court summed up its thinking as follows (R. 254-255):

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would

be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

SUMMARY OF ARGUMENT

I

The evidence is sufficient to establish that petitioner wilfully and falsely misrepresented a material fact—his occupation—during his naturalization proceedings.

A. Petitioner was asked to state his occupation at three separate points in the proceedings prior to his naturalization. Three times he replied that his occupation or business was real estate. The answers which petitioner gave to these straight-forward questions were, as both lower courts found, shown by clear, unequivocal, and convincing evidence to have been false.

On at least five different occasions since his naturalization, petitioner has told different federal and state agents or agencies that he regularly dealt in illicit liquor before, during, and after his naturalization. The government also presented other evidence showing that, from 1921 until long after the filing of his petition for naturalization on May 1, 1925, petitioner was continuously engaged in the illegal alcohol traffic, and that he and his brother grossed as much as \$6,000 each week from that activity. Petitioner had commercialized his unlawful actions to the point of purchasing trucks and warehousing facilities, renting an office as

a base of operations, and hiring a foreign representative.

As opposed to the evidence that petitioner was employed in the illegal alcohol traffic, there was proof that petitioner purchased one piece of property in his own name in 1922, and that the Koslo Realty Corporation, in which he had some interest, purchased certain property in 1924 with money derived from petitioner's liquor and gambling activities. As of May 1, 1925, the date of his petition for naturalization, petitioner had not earned any money from real estate transactions. The "real estate" office which petitioner supposedly operated was actually a "cover" for his illegal business. The lower courts thus properly concluded that petitioner's sporadic real estate ventures were not his true occupation at that time, and that there was abundant evidence showing that he was actually engaged in the business of violating the prohibition laws when he was naturalized.

B. 1. The lower courts were also fully justified in concluding that petitioner's claim that his occupation was "real estate" was a knowing falsification. It is inherently unreasonable that a person would regard a business (real estate) from which he has not derived any money as his occupation, when at the same time he was earning large sums of money from commercialized illicit actions. Moreover, the evidence shows that petitioner was knowingly using the designation of "real estate" to cover up his bootlegging operations. During the naturalization process, petitioner twice named Harry C. Sausser as one of his

expected witnesses, and gave Sausser's occupation as "real estate." In fact, however, Sausser was petitioner's Canadian representative in the purchase of alcoholic beverages for later illegal importation. The term "real estate" was a conscious protective euphemism for Sausser's occupation, just as it was for petitioner's.

Petitioner's contention that he might have interpreted the questions as to occupation to refer only to the legal occupation of real estate, based as it is on realty transactions which took place *after* he filed his petition for naturalization, is not well founded. All that is material to this case is whether or not petitioner was, or could reasonably believe that he was, occupied in real estate as of May 1, 1925 (the date of his petition for naturalization) when he for the third time officially so stated. As of that date, petitioner had purchased a house and conveyed it to his wife, and the Koslo Corporation had made one purchase of property. Nothing else in the way of realty dealings had taken place. Petitioner's occupation was not "real estate" at the times in issue here; it was bootlegging. On the facts of this case, if petitioner thought he had to list only his legal occupation, he should have answered "none," since the facts show that he had no legal occupation. When, therefore, on three different occasions petitioner stated that his occupation was real estate, his answers were wilfully false.

2. Petitioner's reliance upon *Nowak v. United States*, 356 U.S. 660, and *Maisenbergl v. United States*, 356 U.S. 670, is misplaced. In those cases,

the Court held that the question which the defendants answered incorrectly could easily have been interpreted by them "as a two-pronged inquiry relating simply to anarchy" rather than as an inquiry as to membership in either an anarchistic or a communistic organization (356 U.S. at 664)*. In the Court's view, that conclusion flowed from the vague and misleading phraseology of the question itself. Here, however, there was no such possibility of confusion. The question answered falsely by petitioner was very simple, and he answered that question falsely on three occasions, at three separate points in the naturalization process. Unlike *Nowak* and *Maisenberg*, the decision here for review does not present broad social judgments—judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship. It involves only the factual question of whether a person can reasonably be expected to know how he makes his living.

C. Petitioner's concealment of his true occupation misrepresented a material fact. Petitioner's character was, in part, the test of his fitness for citizenship. This in turn required consideration of his then present (1925) and past behavior as one evidentiary criterion for assessing his character. When petitioner falsified as to his occupation, he foreclosed intelligent inquiry as to whether the behavior shown by that occupation was consistent or inconsistent with good moral character, an evaluation which was for the naturalization court, not the petitioner.

The materiality of petitioner's false statement is clearly shown when it is considered in the light of the fact that he engaged in flouting the Eighteenth Amendment and its implementing laws as a means of livelihood over a period of years. The evidence shows massive involvement for massive profits. It cannot be denied that the disclosure of petitioner's true occupation would very likely have led the District Court to refuse naturalization. The falsification was therefore highly material.

II

The lapse of time since naturalization did not bar the government from instituting denaturalization proceedings against petitioner.

A. Congress has not provided a limitation period applicable to denaturalization proceedings. Subsection (i) of Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(i)) expressly provides that the authority to cancel certificates of naturalization procured by wilful misrepresentation "shall apply not only to any naturalization granted * * * under the provisions of this subchapter, but to any naturalization heretofore granted by any court * * *." In terms, then, Congress has affirmatively decided that naturalization proceedings are not to be barred by the lapse of any stated period of time, and that the revocation authorization in the 1952 Act should have retroactive application.

Congress made this choice deliberately, since the principle of retroactive application (without time limitation) of the authority to denaturalize has been

included in the statutes governing denaturalization proceedings ever since 1906. This Court in the past has accorded its natural meaning to the Congressional language authorizing retroactive application of the power to denaturalize, and has relied upon the natural meaning of the language of Section 340(a) of the present Immigration and Nationality Act to reach the conclusion that an affidavit of good cause must be filed with the complaint for denaturalization. Similar treatment in this case leads to the conclusion that Congress has placed no time limitation upon the institution of denaturalization proceedings.

B. 1. On general principles, this suit should not be barred by laches. This Court has consistently held that the doctrine of laches is not imputable to the government in enforcing its rights, on the ground that "the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided." *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315. Thus, unless Congress has expressly manifested a contrary intention, the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations.

2. (a) Laches is principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the parties. Want of due diligence by the plaintiff may make it unfair to pursue the defendant, but fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal

to equity by the defrauded party because of mere lapse of time. It is especially unfair to bar the suit because of mere lapse in a case of time where the fraud is worked on the court itself, for the courts have always been willing to go very far to set aside fraudulently begotten judgments. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

(b) These principles are applicable to denaturalization proceedings. The 225 examiners and clerks who handled 152,000 naturalizations in the year in which petitioner sought citizenship (1925) had to rely upon the truthfulness of the statements made by the applicants, and it was inevitable that some frauds would occur which would not be discovered until years later. In view of the large numbers involved, it is not reasonable to hold the United States as an entity responsible for immediately correlating every piece of information that may come into the hands of one of its many agencies. Congress, when it first authorized a denaturalization procedure, had in mind the extensive frauds then current in citizenship proceedings, and deliberately rejected a policy of time limitation. For the same reasons, this Court should not adopt a doctrine of laches which would nullify the Congressional decision, especially since the defendant is protected against the dangers that may result from delay by the heavy burden of proof which the government must sustain in making out its case for denaturalization. So long as the government can show by clear and convincing evidence that the defendant obtained

the privileges of citizenship by fraud, it ought to be permitted to do so.

3. Applying appropriate precedents, the lower courts have uniformly refused to apply any time limitations to denaturalization actions.

4. Even if a doctrine of laches might be applicable in some cases, it would not be available to petitioner in this case, for he can show no prejudice resulting from the delay. The issue in this case concerns the falsity of petitioner's answers as to his occupation. The primary proof that petitioner's answers were wilfully false flows from his own admissions made subsequent to his naturalization. The fact, then, that the witnesses to his naturalization and the naturalization examiners who processed his application have died does not affect the proof in his case.

III

Petitioner's contention that some of his sworn admissions (on which the trial court relied) were tainted by wiretapping is not well founded, for the evidence shows that there was no causal connection between the wiretapping and the government's evidence in this case which related, of course, to petitioner's activities before his naturalization in 1925. The record demonstrates that if petitioner's telephone messages had not been monitored in the 1940's he would have been called before a state grand jury at a time later than the time when he actually appeared, and in connection with another matter. But it is clear from the evidence that petitioner would have been called before the grand jury, in any event, that the state authorities had not learned

anything about petitioner's activities before 1930 through wiretapping, that they did not give petitioner cause to believe that they had learned of those activities through wiretapping, and that the questioning as to petitioner's activities before 1930 was collateral to the subject of investigation. Therefore, such connection as existed between the wiretapping and petitioner's admissions to state authorities that he engaged in the illicit alcohol traffic in years prior to 1930 had become too attenuated to call for application of the "fruits of the poisonous tree" doctrine of *Nardone v. United States*, 308 U.S. 338.

IV

A. An affidavit of good cause was not filed simultaneously with the complaint in the prior denaturalization suit against petitioner. This Court reversed the judgment of the Court of Appeals for this reason and remanded the cause to the District Court with directions to dismiss the complaint. The District Court felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order.

After the present, separate, denaturalization action had been instituted in the District Court, petitioner moved to dismiss the complaint on the ground that the dismissal of the prior proceeding was an adjudication upon the merits which barred the instant action on principles of *res judicata*. The District Court held, however, that the dismissal of the prior action was for lack of jurisdiction in the sense that

that term is used in Rule 41(b), F. R. Civil P., *supra*, pp. 4-5, which provides that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." On appeal, petitioner renewed his contention that the dismissal of the prior action operated as a dismissal with prejudice and therefore barred the present suit. The Court of Appeals held that Rule 41(b) is limited to cases where the trial judge has discretion as to the terms of the order to be entered, and not to orders of dismissal entered at the command of a higher court. It went on to rule that it would violate the intention of all of the courts concerned if the dismissal of the earlier complaint was held in this case to be a judgment on the merits.

Petitioner did not attack the ruling of the Court of Appeals, that the prior dismissal failed to bar the present action, in his petition for a writ of certiorari. His alleged reason for doing so a month later in his motion to amend the petition was that the Solicitor General, by filing a petition for certiorari in *United States v. Lucchese*, No. 57, this Term, had indicated that the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court. However, as appears from our petition and brief in *Lucchese*, the government has consistently taken the position in *Lucchese* that it was merely attempting to

protect its rights in the event of an adverse decision by this Court in the present case, if petitioner's certiorari petition should raise, and this Court accept, the *res judicata* issue. We did not consider the issue worthy of review in itself. There is therefore no reason to relieve petitioner of the consequences usually flowing from a failure to raise an issue of which he is fully aware.

V

In any event, a second denaturalization proceeding is not barred by the failure of the District Court to specify, in the order dismissing the original denaturalization complaint, that the dismissal is without prejudice to the filing of a new complaint, where the dismissal was entered at the direction of this Court for failure to file the affidavit of good cause with the complaint.

A. 1. In one sense, "jurisdiction" refers to those fundamental matters which may always be questioned by one of the parties, even on collateral attack. The failure to file an affidavit of good cause is not the kind of condition which goes to the core of the denaturalization proceeding so that a judgment rendered without compliance therewith would be subject to collateral attack as beyond the competence of a district court.

"Jurisdiction," however, is a term also applied to conditions precedent to a decision by the federal court on the merits of the controversy which, if raised in the original action, bar a decision on the merits, even though lack of compliance therewith will not subject a final judgment to collateral attack. This Court has

called such conditions precedent *quasi-jurisdictional* facts.

The failure to file an affidavit of good cause at the time when the complaint is filed in the denaturalization suit is a defect of this character. Like lack of diversity of citizenship and failure to claim damages in an amount greater than the statutory minimum, it is sufficiently jurisdictional to be available to the defendant so long as the case pends on direct review, even though not a defect which would render a judgment subject to collateral attack.

2. The phrase "lack of jurisdiction" as used in Rule 41(b), F. R. Civil P., *supra*, pp. 4-5, encompasses dismissals for *quasi-jurisdictional* defects such as the absence of an affidavit of good cause. The rule is directed toward the regulation of practice in a pending case and is naturally read as relating to those matters which constitute the "jurisdiction" of the court to proceed with the pending case, rather than as being limited to those basic jurisdictional matters which are always available, even on collateral attack.

Moreover, the failure to file an affidavit of good cause was the basis for a motion to dismiss for lack of "jurisdiction of the subject matter of the action" in *Lucchese v. United States*, 356 U.S. 256, and *United States v. Diamond*, 356 U.S. 257. This Court's ruling in those cases was a holding that such motions for lack of "jurisdiction of the subject matter" should have been granted. The order of dismissal pursuant to the mandate of this Court was therefore a dismissal for "lack of jurisdiction" under Rule 41(b).

B. The Court of Appeals' conclusion that Rule 41(b) applies only to rulings where the District Court purports to exercise some discretion is supported by the logic of the rule itself. Rule 41(b) expressly treats three situations as grounds for "dismissal under this subdivision." In all of these situations, the trial court is called upon to exercise a measure of discretion, and the defect alleged, if shown to exist, is sufficiently serious to warrant judgment on the merits against the plaintiff. And other dismissals "not provided for in this rule," but bound by its terms as to prejudice, also involve the exercise of discretion. Here, the district judge believed that he lacked power to go beyond the words of this Court's mandate at all, and entered the order of dismissal as a purely mechanical act unrelated to the merits of the case. Rule 41(b) ought not to apply to such an order.

ARGUMENT

I

THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT PETITIONER WILFULLY AND FALSELY MISREPRESENTED A MATERIAL FACT—HIS OCCUPATION—DURING HIS NATURALIZATION PROCEEDINGS.

On the issue of fraud, petitioner has attempted to meet the government's case in two ways. First, he has discussed the evidence as though it really did provide the basis for an inference that he was engaged in real estate as an occupation (Pet. Br. pp. 20-24), ignoring the fact that the real estate transactions upon which he relies for this inference occurred at a time subsequent to his misrepresentations and false state-

ments during the naturalization process. Then he treats this case as though the evidence shows that he had two occupations—one a course of criminal conduct, the other a legitimate endeavor—and argues that there can be no misrepresentation where an applicant for naturalization, in good faith, sets forth a legitimate occupation which he pursues on at least a part-time basis (*id.*, pp. 25-29). We show, however, that when petitioner sought citizenship, and for many years before that time, the illicit alcohol traffic was his only occupation, and that he well knew what his occupation was at the time when he initiated his naturalization process. Hence, his misrepresentations as to his occupation were knowingly false and were material to his admission to citizenship.

A. There was an abundance of evidence showing that, at the time of his naturalization, petitioner followed the illegal alcohol traffic as an occupation, and was not occupied in real estate.

When petitioner filled out his preliminary form for petition for naturalization, one of the questions which had to be completed was "My present occupation is -----." Petitioner inserted the words "Real Estate" (Govt. Ex. 7, R. 200). When examined under oath by the naturalization examiner, petitioner stated that his business was "Real Estate" (Govt. Ex. 8, R. 202). On May 1, 1925, when he submitted his petition for naturalization, petitioner answered the second question as follows, "My occupation is *Real Estate*" (Govt. Ex. 9, R. 204). There was nothing vague, complicated or confusing about these questions regarding petitioner's business or occupation. They

simply asked petitioner to describe, as the District Court put it, the "income producing activity to which [petitioner] devote[d] the major portion of his time and from which he derive[d] the major portion of his income" (R. 27). The answers which petitioner gave were, as both lower courts found, shown by clear, unequivocal, and convincing evidence to have been false.

On at least five different occasions since his naturalization, petitioner has told different federal and state agents or agencies that he dealt in illicit liquor before, during, and after his naturalization. Petitioner was specific as to the dollar volume of his operations. According to his own sworn testimony, he reported an income of \$305,000 for the period 1919-1932, an average of over \$23,000 each year.* Almost all of this came from his illegal traffic in alcohol. There was other evidence that petitioner and his brother grossed as much as \$6,000 each week in 1922-1923 from their criminal activities. The scale of their activities was sufficiently large so that they had illicit liquor valued at \$250,000 on hand at the time of a police raid on one of the warehouses which they operated for Kessler. *Supra*, pp. 7-10.

Petitioner's bootlegging activities did not terminate when Kessler went to prison at the end of 1923. To the contrary, petitioner borrowed illicit liquor from Kessler in order ~~to~~ stay in business, took on Sausser as his Canadian representative, and engaged

*Petitioner did not give these figures casually, or without reflection, since they were taken from the state income tax returns which he filed in 1936 for the years in question (R. 187-188).

in elaborate transactions for the sole purpose of importing illegal alcohol. Moreover, there was no question but that petitioner dominated the working arrangement which he had with his brother. As the witness Kessler put it, "My main trust was Frank Costello. Eddie Costello could not hold a conversation with anybody for ten minutes" (R. 73).

As opposed to the evidence that petitioner was employed in the illegal alcohol traffic, there was proof that petitioner purchased one piece of property in Queens County, New York, in his own name in 1922, and that a corporation in which petitioner had some interest (Koslo Realty Corporation) purchased certain property late in 1924. There was testimony that petitioner and his brother purchased an old mansion in Long Island City for use as a warehouse for liquor. Long Island City is located in Queens County, so the 1922 real estate transaction may have been undertaken for the purpose of advancing petitioner's illegal dealings. The property in Long Island City may also have been purchased as a residence, since it was conveyed to petitioner's wife in 1923. At the least, there was no evidence that petitioner purchased it either as an investment or for speculative purposes. As for the 1924 purchase by the Koslo Realty Corporation, that property had not been sold as of May 1, 1925, the date of petitioner's petition for naturalization, and the \$20,000-\$25,000 which petitioner later said he received as profit from the sale was as yet unrealized. The very money which petitioner put into the latter real estate purchase was derived from his liquor and gambling activities. The evidence showed that the

"real estate" office which petitioner supposedly operated at 405 Lexington Avenue, New York City, was simply a "cover" for petitioner's illegal business and was actually petitioner's base of operations for his illicit alcohol traffic.

The lower courts thus properly concluded that petitioner's sporadic real estate ventures were not his true occupation, and that he was actually engaged in the business of violating the prohibition laws when he was naturalized.

B. Petitioner knew that he was required to disclose his true source of livelihood when asked to state his occupation, even though that occupation was an illegal one.

1. The lower courts were also fully justified in concluding that petitioner's claim that his occupation was "real estate" was a knowing falsification. First of all, it is inherently unreasonable that a person would regard a business (real estate) from which he has not derived any money as his occupation, when at the same time he was earning large sums of money over a period of years from his illicit actions and had commercialized those actions to the point of maintaining an office, employing a bookkeeper assistant, and purchasing trucks for the specific purpose of advancing his liquor dealings.

Moreover, as set forth above, the evidence shows that petitioner was knowingly using the designation of "real estate" to cover up his bootlegging operations. It is significant that petitioner, in his preliminary form for petition for naturalization and during his

examination under oath, named Harry C. Sausser as one of his expected witnesses, and listed Sausser's occupation as "Real-Estate" (Govt. Exs. 7, 8, R. 201, 202). As a matter of fact, however, according to petitioner's later sworn statement and the testimony of Sausser's daughter, Sausser was petitioner's Canadian representative in the purchase of alcoholic beverages which were later illegally imported into the United States. The term "real estate" was a conscious protective euphemism for Sausser's occupation, just as it was for petitioner's.

Petitioner points to real estate transactions to which he was a party, in one way or another, apparently believing that they tend to make the considerable body of evidence against him less credible. He refers (Brief, pp. 21-22) to purchases and sales made during 1925 and 1926 by the Koslo Corporation, and draws the inference that some of the property was improved between purchase and sale, but nowhere does he squarely face up to the fact that all of these transactions took place some time *after* he filed his preliminary form, appeared before the examiner, and filed his petition for naturalization. Petitioner's contention that he might have interpreted the questions as to occupation to refer only to the legal occupation of real estate (Brief, p. 26) is thus not well founded. It may be that he began to deal seriously in real estate after his naturalization so as to gain investment opportunities for his illegal profits from the liquor business. It may be that petitioner simply wanted to increase the density of the "cover" for his illicit

traffic. But this misses the mark so far as the issue of knowing, wilful, falsification in the naturalization proceedings is concerned. All that counts is whether or not petitioner was, or could reasonably believe that he was, occupied in real estate as of May 1, 1925 (the date of his petition for naturalization) when he for the third time officially so stated. As of that date, petitioner had purchased a house and conveyed it to his wife, and the Köslo Corporation had made one purchase of property. Nothing else in the way of realty dealings had taken place. Petitioner's occupation was not "real estate" at the times in issue here.

Petitioner argues his case as though the facts show, and the lower courts found, that he had two occupations; one legal and one illegal (Brief, pp. 28-29). However, the facts show and the lower courts found that petitioner had only one occupation, and that one an illegal activity. While the Court of Appeals noted that "it is conceivable that an applicant might believe that the answer called for no more than a disclosure of some 'legal occupation'" (R. 250-251), it also noted that there was no evidence that petitioner so believed.⁷

⁷ We do not think that this can be construed as a statement that petitioner's failure to take the stand warranted the inference that petitioner understood the question to require disclosure of all occupations. Rather, we read the language of the Court of Appeals to mean that, though one might conceive of a case in which an applicant had misunderstood the question, in this case the government's uncontradicted evidence (discussed *supra*, pp. 29-33) showed that petitioner had not misunderstood the question and petitioner had not presented any evidence to refute the government's showing.

Petitioner extends the opinion of the court below by his assertion that the Court of Appeals concluded that his failure to testify

Actually, on the facts here, if petitioner thought he had to list only his legal occupation, he should have answered "none", since the facts show that he had no legal occupation. The unchallengeable evidence shows that petitioner was engaged for a long period of time in an illegal business from which he earned large amounts of money, and that his real estate dealings as of May 1, 1925 were few in number, devoid of profit, and possibly undertaken to advance his illicit warehousing activities. He therefore was not actually occupied in real estate. When, therefore, on three different occasions in the naturalization proceedings petitioner stated that his occupation was real estate, his answers were wilfully false.

warranted the inference that petitioner understood the question as to occupation to call for disclosure of all income-producing activities, legal or illegal (Brief, pp. 29-33). The Court of Appeals noted that, if petitioner had engaged in any real estate transactions other than those reflected in this record, those other transactions would be peculiarly within petitioner's knowledge, and his failure to prove them warranted the inference that there were none (R. 250). Proof by petitioner would not have required taking the stand. If other real estate transactions existed, they could be proved in some manner other than through petitioner's testimony, such as documentary evidence. The rational connection between petitioner's failure to show other dealings and the inference that there were no other real estate transactions is sufficiently strong, and the comparative convenience of producing additional evidence sufficiently favorable to petitioner, to render the inference permissible even in a criminal case (which this was not). See *Morrison et al v. California*, 291 U.S. 82, 87-90; compare *Tot v. United States*, 319 U.S. 463, 467-470; *Speiser v. Randall*, 357 U.S. 513, 523-524.

The District Court found the evidence to be clear and convincing* that petitioner's occupation at the time when he applied for naturalization "was not 'real estate' but was bootlegging", and that petitioner wilfully misrepresented that his occupation was real estate to secure his naturalization (R. 21-22, 28.) The Court of Appeals was "more than satisfied that the findings by the district court which will sustain a cancellation of the certificate of naturalization are the only findings possible on the evidence, and that they fulfill the strictest requirements of proof" (R. 248).

2. Petitioner's reliance (Brief, pp. 25-26) upon *Nowak v. United States*, 356 U.S. 660, and *Maisenberg v. United States*, 356 U.S. 670, is misplaced. In those cases, the Court held that the question which the defendants answered incorrectly could easily have been interpreted by them "as a two-pronged inquiry relating simply to anarchy" rather than an inquiry as to membership in either an anarchistic or a communist organization (356 U.S. at 664; see 356 U.S. at 672). The question at issue in those cases read as follows (356 U.S. at 663):

28. Are you a believer in anarchy? * * * Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? * * *

* This is the proper test in denaturalization. *Schneiderman v. United States*, 320 U.S. 118, 125, 135; *Baumgartner v. United States*, 322 U.S. 665, 670; *Knauer v. United States*, 328 U.S. 654, 657; *Nowak v. United States*, 356 U.S. 660, 663; *Maisenberg v. United States*, 356 U.S. 670, 672.

Although the two halves of the second part of the question, referring to "anarchy" and "overthrow", were phrased disjunctively as a matter of syntax, the Court concluded that it was sufficiently misleading to make "it not implausible to read the question in its totality as inquiring solely about anarchy"—a conclusion buttressed by the fact that the first part of Question 28 referred solely to anarchy, and the second portion of the question did not expressly mention communism or other ideologies incompatible with peaceful political change (356 U.S. at 664; see *Baranblatt v. United States*, 360 U.S. 109, 128). Here, however, there was no such possibility of confusion. The question answered falsely by petitioner was very simple: "My present occupation is ———.", and he answered that question falsely, not once but three times, at three separate points in the naturalization process.

There are further reasons for distinguishing *Nowak* and *Maisenberg*. In *Nowak*, no evidence was introduced tending to show that the defendant actually understood Question 28 as calling for disclosure of his membership in the Communist Party. Instead, the government was driven to rely upon the inference that *Nowak*, an important Communist Party functionary, must have known that the deportation and exclusion statutes applied to aliens who believe in or advocate the violent overthrow of our present form of government, and that the Communist Party advocated such a policy. The Court regarded this inference as untenable (356 U.S. at 665, fn. 3). Here, there was an

abundance of evidence to show that petitioner well knew what his occupation was during the prohibition era. And lastly, unlike *Norak*, the "decision here for review * * * [does not present] broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U.S. 665, 671. It involves only the factual question of whether a person can reasonably be expected to know how he makes his living—i.e., what is his occupation.⁹

Petitioner's reliance (Brief, pp. 26 (28, 30) upon other recent decisions, such as *United States v. Kessler*, 213 F. 2d 53 (C.A. 3); *Baghdasarian v. United States*, 220 F. 2d 677 (C.A. 1); *Roufford v. United States*, 239 F. 2d 841 (C.A. 1); *United States v. Minerich*, 250 F. 2d 721 (C.A. 7); and *United States v. Probst*, 271 F. 2d 289 (C.A. 2), seems even less appropriate.

In *Kessler*, the evidence established that the defendant had stated during the naturalization proceedings that she had never been arrested for a violation of any law because her seventeen arrests for "obstructing highway", all of which resulted in her discharge, were actually arrests for picketing during a labor dispute, a lawful activity. Moreover, there was no such offense as "obstructing highway" in the jurisdiction where the arrests occurred. Contrast that with this case, where petitioner attempts to substitute ingenious argument for solid proof of the lack of a wilful misrepresentation.

In *Baghdasarian v. United States*, the holding was that the defendant was never a member of the Communist Party and that her husband's enrollment of her as such, without her knowledge or consent, did not make her a member (*id.*, 220 F. 2d at 679-680). Here, there is no question but that petitioner was personally responsible for the false answers relied on by the government.

Roufford v. United States, was a criminal prosecution for a false statement made in a preliminary form for petition for naturalization. The defendant stated that he had been married only once, whereas he had actually also contracted a second

In any denaturalization case where the defendant contends that his misrepresentation was made inadvertently—that his statement was not a knowing falsification—there is no automatic way for the government to establish the contrary. But “it has been some time now since the law viewed itself as impotent to explore the actual state of a man’s mind,” *Smith v. California*, 361 U.S. 147, 154. “This is so even where it is alleged that the defendant fraudulently misrepresented his mental intent to forswear all foreign allegiances at the time of naturalization. See *Knauer v. United States*, 328 U.S. 654. Thus, federal courts have held the evidence sufficient to sustain the decree of denaturalization where the defendants concealed

bigamous marriage. The Court of Appeals held (233 F. 2d at 845-846) that there was an issue as to whether defendant understood this question as referring only to valid marriages, and reversed because the trial court had refused to permit the jury to pass on this issue. Granted that an issue of wilfulness may be raised by petitioner’s argument, to the extent that there was such an issue here it was resolved against petitioner by both lower courts.

In *United States v. Michorich*, unlike this case, defendant’s statements that he had never been arrested were true when made; the question on the issue of fraud was whether he had a duty to disclose arrests occurring immediately prior to the formal court action of naturalization.

In *United States v. Profaci*, the defendant had not revealed his arrests in the land from which he emigrated, but the Court of Appeals held that the government’s proof was sufficiently vague to permit the inference that Profaci may have been asked only whether he had ever been arrested in the United States. The Court of Appeals contrasted the case before it with cases like this, where “it is possible to infer an intent to falsify and deceive from the mere untruthful response to a question, the clarity of which leaves little or no room for a reasonable explanation of misunderstanding.” 274 F. 2d at 292.

their criminal records, despite claims by the defendants that immigration authorities told them that their records did not matter unless they had "served time" or been convicted of a felony (*United States v. Montalbano, et al.*, 236 F. 2d 757, 759 (C.A. 3), certiorari denied *sub nom. Genovese v. United States*, 352 U.S. 952), or that the concealment was not wilful (*United States v. Gelbert*, 121 F. Supp. 414, 416 (N.D. Ill.); *United States v. Brass*, 37 F. Supp. 698, 699-700 (E.D.N.Y.)); where the defendant misrepresented his marital status, despite his claim that the misrepresentation was not wilful (*Lumantes v. United States*, 232 F. 2d 216, 217 (C.A. 9), affirming *United States v. Lumantes*, 139 F. Supp. 574 (N.D. Cal.); *United States v. Intrieri*, 36 F. Supp. 374, 375 (M.D. Pa.); *United States v. Zaltzman*, 19 F. Supp. 305 (W.D.N.Y.)); and where the defendant aided another alien in illegally becoming a citizen, knowing that the other alien was illegally in this country, despite the contention that the defendant misunderstood the seriousness of the situation and was honestly attempting to help a business customer (*United States v. Sherman*, 40 F. Supp. 478, 479 (E.D.N.Y.)).

Here, every reasonable inference from the record supports the view that petitioner's only occupation at the time of naturalization was bootlegging and that his three-time answer that his occupation was real estate was consciously and knowingly false.

C. Petitioner's concealment of his true occupation misrepresented a material fact.

The Nationality Act of 1906, Section 4, paragraph 4, 34 Stat. 596, 598, under which petitioner was natu-

ralized, provided that no alien should be admitted to citizenship unless "he has behaved as a man of good moral character" for at least five years immediately preceding the date of his petition for naturalization. Thus, the applicant's character, not only at the time of his naturalization proceeding in 1925 but in prior years as well, was, in part, the test of his fitness for citizenship. This in turn required consideration of the applicant's present and past behavior as one evidentiary criterion for assessing his character. It follows that proof as to his behavior would be pertinent—regardless of whether revelation of the true facts would have itself established a disqualification for citizenship, and regardless of whether the applicant might have effectively met the negative inference as to character which such revelation might imply. Rational appraisal of a man's present and past moral character demands full disclosure, not merely disclosure of those aspects of the applicant's conduct which are favorable or neutral. When the applicant falsifies as to his present and past behavior he forecloses intelligent inquiry as to whether that behavior is consistent or inconsistent with good moral character, an evaluation which is for the naturalization court, not the applicant. The test of materiality is, in short, whether the question seeks information of past or present behavior pertinent to one of the prerequisites of citizenship designated in the statute—in this case, good moral character at the time of, and for five years preceding, naturalization.

The fact, for example, that a person has been arrested and charged with crime in the past, though not necessarily a disqualification for citizenship, is material to the question of his past behavior as a person of good moral character. A false answer to this question (cutting off further investigation) has been held to constitute a material falsification even though a truthful answer might not have furnished a complete basis for a denial of naturalization. *United States v. Montalbano*, *supra*, 236 F. 2d 757, 759-760 (C.A. 3), certiorari denied *sub nom. Genovese v. United States*, 352 U.S. 952; *Corrado v. United States*, 227 F. 2d 780, 782-784 (C.A. 6), certiorari denied, 351 U.S. 925; *United States v. Ascher*, 147 F. 2d 544 (C.A. 2), certiorari denied, 325 U.S. 884; *United States v. De Francis*, 50 F. 2d 497 (C.A. D.C.); *United States v. Saracino*, 43 F. 2d 76 (C.A. 3); *United States v. Accardo*, 113 F. Supp. 783 (D. N.J.), affirmed, 208 F. 2d 632 (C.A. 3), certiorari denied, 347 U.S. 952. False answers to questions concerning identity (*United States v. De Lucia*, 163 F. Supp. 36, 40-41 (N.D. Ill.), affirmed, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836), marriage (*United States v. Lumantes*, 139 F. Supp. 574 (N.D. Cal.), affirmed 232 F. 2d 216 (C.A. 9)), residence (*United States v. Udani*, 141 F. Supp. 30 (S.D. Cal.)), and events which occurred outside the statutory period (*Stevens v. United States*, 190 F. 2d 880, 881 (C.A. 7)) have similarly been held to constitute material falsifications. The proper standard is whether the falsification had the effect of precluding the government from pursuing an avenue of investigation which might

have resulted in the applicant's failure to obtain citizenship.¹⁰ See also the discussion in the government's brief in *Chaunt v. United States*, No. 22, this Term at pp. 28 *et seq.*

The same rationale was applied by the very district judge (Thacher, D. J.) who admitted petitioner to citizenship (R. 205; Govt. Ex. 9) in a denaturalization case decided the year following petitioner's naturalization. In *United States v. Mirsky*, 17 F. 2d 275 (S.D.N.Y.), the defendant had been convicted of violating the National Prohibition Act and the Eighteenth Amendment during the statutory period of five years preceding his naturalization. The judge cancelled the certificate of naturalization, concluding

¹⁰ The same standard has been applied in determining the materiality of false statements made in visa applications and other documents used by aliens to procure admission into the country, that is, the tendency of the misrepresentation to forestall inquiry as to the applicant's eligibility to enter: *Duran-Garcia v. Neelly*, 246 F. 2d 287, 291 (C.A. 5); *Ablett v. Brownell*, 240 F. 2d 625, 630 (C.A. D.C.); *Landon v. Clarke*, 239 F. 2d 631, 634-636 (C.A. 1); *United States v. Flores-Rodriguez*, 237 F. 2d 405, 411-412 (C.A. 2); *United States ex rel. Volpe v. Smith*, 62 F. 2d 808, 812 (C.A. 7), affirmed on other grounds, 289 U.S. 422.

Like criteria for materiality has been applied in perjury cases (*United States v. Moran*, 194 F. 2d 623, 626 (C.A. 2); *Woolley v. United States*, 97 F. 2d 258, 262 (C.A. 9), certiorari denied, 305 U.S. 614; *Carroll v. United States*, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; *United States v. Parker*, 244 F. 2d 943, 950-951 (C.A. 7), certiorari denied, 355 U.S. 836) and prosecutions for false statements under 18 U.S.C. 1001 (*Weinstock v. United States*, 231 F. 2d 699, 701-702 (C.A. D.C.); see *Freidus v. United States*, 223 F. 2d 598, 601-602 (C.A. D.C.)).

that "One who deliberately violates the Eighteenth Amendment of the Constitution cannot be said to be attached to the principle declared by that amendment." It is not important that the district judge put his decision on the ground that a statutory prerequisite to naturalization other than good moral character—lack of attachment to the principles of the Constitution—did not exist. Both requirements are (8 U.S.C. 1427(a)), and were, at the time of petitioner's naturalization (Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 598), statutory prerequisites for naturalization. A false answer precluding further inquiry as to the existence of either requirement would, therefore, be a material falsification. False answers as to convictions for violating or violations of the Eighteenth Amendment and the National Prohibition Act have been treated by the courts as material to either or both requirements. See *United States v. De Francis, supra*, 50 F. 2d 497, 498 (C.A. D.C.); and *Turlej v. United States*, 31 F. 2d 696, 698-699 (C.A. 8).

The materiality of petitioner's false statement is clearly shown when it is considered in the light of the fact that he engaged in flouting the Eighteenth Amendment and its implementing laws as a means of livelihood over a period of years. The evidence does not show isolated instances of the violation of a national policy regarded as unwise by many. Rather it shows massive involvement for massive profits, on a large business scale. The purchase of a bottle of "bathtub gin" is one thing; the commercialization of an unlawful course of conduct is quite another. It

cannot be denied that the disclosure of petitioner's true occupation would very likely have led the District Court to refuse naturalization. *United States v. Mirsky, supra*. The false statement as to occupation was therefore highly material.

II

THE LAIPE OF TIME SINCE NATURALIZATION DID NOT BAR THE GOVERNMENT FROM INSTITUTING DENATURALIZATION PROCEEDINGS AGAINST PETITIONER

Having procured his naturalization through a fraudulent misrepresentation, petitioner seeks to retain the privilege of citizenship by contending that the government ought not to be permitted to maintain this action. In effect, he asks this Court to forge a special rule of laches applicable to denaturalization proceedings. However, Congress affirmatively chose not to limit the time within which a suit may be brought to cancel a certificate of citizenship, and laches has never been considered applicable to actions by the United States. Moreover, petitioner would not be in a position to invoke the doctrine of laches even if it were generally available.

A. Congress has not provided a limitation period applicable to denaturalization proceedings.

Subsection (i) of Section 340 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1451(i)) provides that the authority to cancel certificates of naturalization procured by wilful misrepresentation "shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to

any naturalization heretofore granted by any court, * * *,” *supra*, pp. 3-4 (emphasis added). In terms, then, Congress has affirmatively decided that denaturalization proceedings are not to be barred by the lapse of any stated period of time, and that the revocation authorization in the 1952 Act should have retroactive application. This legislative choice was a deliberate one, not at all assignable to inadvertence, since, as we discuss below, the language used by Congress is traceable to earlier statutes, and Congress well knew how to set forth a limitation, had it chosen to do so.¹¹

Subsection (i) of Section 340, *supra*, did not represent an innovation in the law. Section 338 of the Nationality Act of 1940 (54 Stat. 1158, 8 U.S.C. (1940 ed.) 738) also provided a means for cancelling certificates of citizenship on proper grounds, and subsection (g) used the same language now found in subsection (i):

The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this Act, but to any naturalization heretofore granted by any court, * * *.

¹¹ For example, 8 U.S.C. 1251, which deals with the deportation of aliens, subsection (a)(4) provides that an alien convicted of a crime involving moral turpitude is deportable, but limits the time period within which the conviction must occur to “within five years after entry.” The absence of a similar limitation in 8 U.S.C. 1451 (Section 340 of the 1952 Act) is strong evidence that Congress did not intend to limit the time within which denaturalization proceedings must be instituted. Cf. *Benanti v. United States*, 355 U.S. 96, 105.

Both subsections really owe their origin to Section 15 of the Act of June 29, 1906, 34 Stat. 596, 601, which first expressly authorized denaturalization proceedings, on the grounds of fraud or illegal procurement, and added:

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.¹²

¹² In 1905, President Theodore Roosevelt appointed a Commission on Naturalization, which made an extremely detailed and thorough report of the nation's immigration and naturalization policies, including a summary of the extensive frauds practiced in naturalization proceedings prior to that time. The report, which included the draft of a proposed law, was printed as a House Document. Section 34 of that draft dealt with revocation of citizenship, and included retroactive application without time limitation. House Doc. No. 46, 59th Cong., 1st Sess., App. F, p. 106. The draft bill was introduced in the House of Representatives and considered by the Committee on Immigration and Naturalization. The bill reported by the Committee (H.R. 15442, 59th Cong., 1st Sess.) included, in Section 17, the proposed revocation procedure. See House Report No. 1789, 59th Cong., 1st Sess., pp. 3, 7. After amendment of the bill during floor debate, Section 17 emerged as Section 15, as passed by the House. 40 Cong. Rec. 7871, 7876. The Senate did not change Section 15. 40 Cong. Rec. 9359-9361. After a conference on other amendments, the bill, including Section 15, was passed by Congress and signed by the President. 40 Cong. Rec. 9680, 9777, 9804, 9807. The entire substance of Section 340 of the present Act is taken from Section 15 of the 1906 Act. See *Binderzyk v. Finucane*, 342 U.S. 76, 79; *United States v. Zucca*, 351 U.S. 91, 94.

A case testing the provisions of Section 15 of the 1906 Act, *supra*, came before this Court not long thereafter. In *Johannessen v. United States*, 225 U.S. 227, petitioner procured his naturalization in 1892, through perjured testimony. Sixteen years later, in 1908, the government learned of the way in which petitioner obtained his citizenship, instituted proceedings to cancel his certificate, and obtained a decree in its favor. When the case reached this Court, petitioner contended, *inter alia*, that the provisions of Section 15 were not retrospective. As this Court viewed it, however, "This is refuted by a reading of the closing paragraph of the section," 225 U.S. at 242. Finally, Johannessen argued that, if retrospective in form, the Section was void as an *ex post facto* law. The Court rejected the contention, noting that Article I, Section 9 of the Constitution, prohibiting *ex post facto* legislation, is confined to laws respecting criminal punishments, and that Section 15 "imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges" (*Ibid.*)

In a later case, *Luria v. United States*, 231 U.S. 9, 21-22, the Court again accorded its natural meaning to the terms used by Congress in the final paragraph of Section 15, saying:

* * * it would seem that the last paragraph [of § 15], in view of its plain and unambiguous language, must be accepted as extending the preceding paragraphs to all certificates, whether

issued theretofore under prior laws or thereafter under that [1906] act.¹³

This Court has also given literal effect to language used by Congress in the present Immigration and Nationality Act.¹⁴ The literal language of Section 340 (i), 8 U.S.C. 1451(i) (*supra*, pp. 3-4), places no time limitation upon the institution of denaturalization proceedings, and as we have shown, the history of the provision fully supports the literal reading.

B. On general principles, this suit should not be barred by laches.

Petitioner argues that, although Congress has refrained from placing any time limitations on proceedings for denaturalization, the courts should in effect impose their own limitation by applying the doctrine of laches to denaturalization procedure. However, not only is the doctrine of laches not applicable to the United States generally, but it would be particularly inappropriate if applied in denaturalization proceedings founded on fraud. And even if the doctrine were applicable in some situations there is no occasion for its application in this case.

¹³ See also *Sourino v. United States*, 86 F. 2d 309, 310 (C.A. 5), certiorari denied, 360 U.S. 661, where the defendant fraudulently misrepresented that he was single, although he was actually married. An indictment charging the making of a false affidavit, the giving of false testimony, and the fraudulent procurement of naturalization was barred by the statute of limitations. The denaturalization proceeding, however, was not similarly barred.

¹⁴ See *United States v. Zucca*, 351 U.S. 91, 95, where the Court relied on the "natural meaning" of the language in Section 340(a) as requiring the conclusion that an affidavit of good cause must be filed with the complaint.

1. *The doctrine of laches does not apply to the United States.*

Ever since *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735-737, this Court has consistently held that laches is not imputable to the government in enforcing its rights. *United States v. Summerlin*, 310 U.S. 414, 416; *Board of Commissioners v. United States*, 308 U.S. 343, 351; *Guaranty Trust Company v. United States*, 304 U.S. 126, 132; *Stanley v. Schwalby*, 147 U.S. 508, 514, 515; *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125, 126; *Fink v. O'Neil*, 106 U.S. 272, 281; *United States v. Thompson*, 98 U.S. 486, 489. In *Kirkpatrick*, an action to recover on a surety bond, it was enough for the purposes of that case to put the rule on the basis that laches, unaccompanied by fraud, would not serve to discharge a surety obligation between private individuals, and that no more rigid rule should be applied to the government. In 1840, however, the Court expressly recognized, in *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315, that although sovereign immunity from the defense of laches or limitations had an historic root in the English common law maxim, *quod nullum tempus occurrit regi* (no lapse of time bars the king), its continued vitality was attributable to "a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided."¹⁵ Thus,

¹⁵ See also the language of Story, J., sitting as a circuit justice in *United States v. Hoar*, 26 Fed. Cas. 329, 330, No. 15,373 (C.C.D. Mass.), a case decided in 1821. Mr. Justice Story was still a member of this Court in 1840.

"the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

United States v. Nashville, C. & St. L. Ry Co., *supra*. Down through the years the doctrine became sufficiently accepted, and was applied in enough varied situations, to permit this Court to say, in *Board of Commissioners v. United States*, *supra*, that "Unless expressly waived, it is implied in all federal enactments."¹⁶ See, generally, as to sovereign rights and remedies, *United States v. United Mine Workers of America*, 330 U.S. 258, 272-273; *United States v. Wittck*, 337 U.S. 346, 359; *Leiter Minerals, Inc. v. United States et al.*, 352 U.S. 220, 224-226; compare *United States v. Lindsay*, 346 U.S. 568, 570.

2. *It would be inappropriate to apply the doctrine of laches to denaturalization for fraud.*

(a) The refusal to apply the doctrine of laches, an equitable doctrine, to the United States is particularly wise where, as here, an action is founded in fraud. "[L]aches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Gallher v.*

¹⁶ Although this statement was made in the context of state limitations and state doctrines of laches, the cases cited *supra*, p. 50, make it clear that the language in *Board of Commissioners* is not attributable to considerations of federal supremacy. It remains true, as the cases hold, that the government's cause of action is subject to a time limit only if Congress has expressly made it so subject.

Cadwell, 145 U.S. 368, 373, see *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 488-489; *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 31; *Czaplicki v. The Hoegh Silvercloud et al.*, 351 U.S. 525, 533. Equity will not lend itself to aid fraud and historically has relieved from it. Thus, as between private litigants, "want of due diligence by the plaintiff may make it unfair to pursue the defendant, [but] fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." *Holmberg v. Armbrrecht*, 327 U.S. 392, 396. And so a defendant may not be entitled to assert a defense of laches to an action based on fraud, "though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party" (*id.* at p. 397). Although, in many instances, it is desirable that there be an end to litigation, the courts have always been willing to go very far "to set aside fraudulently begotten judgments." *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238, 245; *Shawkee Manufacturing Company, et al. v. Hartford-Empire Company*, 322 U.S. 271. When that fraud is worked upon the court itself—as here, where petitioner obtained the benefits of citizenship by making a material misrepresentation to the court—"[i]t is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process

must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud" (*Hazel-Atlas Glass Co.*, *supra*, 322 U.S. at 246).¹⁷

(b) Those principles are applicable to denaturalization proceedings. See *Knauer v. United States*, 328 U.S. 654, 671-674. There is a limit to the misrepresentations that may be made with impunity by one who seeks citizenship. Congress has decided that that limit takes the form of denaturalization proceedings not bound by time limitations, and this Court ought not to depart from established principles to add such a limitation.

152,457 aliens were naturalized in the fiscal year ending June 30, 1925, the year during which petitioner filed his petition for naturalization.¹⁸ "The personnel of the Bureau [of Naturalization] on July

¹⁷ In *Hazel-Atlas Glass Company*, a spurious article in a trade publication was used to advance a patent application and, several years later, to influence the decision by the Court of Appeals for the Third Circuit in a patent infringement suit. This Court, in *Johannessen v. United States*, 225 U.S. 227, 238-239, saw a similarity between an application for citizenship and an application for a patent.

¹⁸ The Annual Report of the Commissioner of Immigration and Naturalization for the Year Ending June 30, 1959, Table 37, p. 76, lists the number of final naturalizations for each year since 1908. The figures for representative years during the period at issue here were as follows:

1939—188,813

1943—318,933

Although the report for the year ending June 30, 1960, has not yet been published, we have been advised that 119,442 aliens were naturalized in the most recent fiscal year.

30, 1925, was 75, and the entire field personnel did not exceed 225 examiners and clerks." Annual Report of the Commissioner of Naturalization for the Year Ending June 30, 1925, Department of Labor, p. 2. It is apparent, therefore, that the examiners were obliged to rely upon the truthfulness of the statements made by the applicants for citizenship, and that the district courts were in no better position to investigate the representations made by those applicants. It is also inevitable that in so extensive a process some frauds will occur which may not come to light until years later. And the greater the fraud, the greater is the probability that it will not come to light immediately. There is no reason why a successful fraud should have immunity from challenge indefinitely.

Moreover, in view of the large numbers involved, it is not reasonable to hold the United States as an entity responsible for immediately correlating every piece of information that may come into the hands of any one of its many agencies. For example, in this case petitioner points to the fact that in 1925 he was indicted for conspiracy to violate the Prohibition Act as showing that the United States had knowledge, close to the time of naturalization, that petitioner was a bootlegger (Pet. Br. 34). But the agency having primary responsibility in naturalization matters, the Immigration and Naturalization Service, can in no realistic sense be charged with knowledge of every prohibition charge made in the country or even in the Southern District of New York, particularly so where, as in petitioner's case, the charge did not result in conviction. And, on the other hand, a United

States Attorney investigating criminal offenses would hardly be in a position to check each particular averment made in a petition for naturalization by a person who happened to be a defendant on a charge of liquor violations. It was undoubtedly the extensive character of naturalization proceedings and the known possibility that frauds would not be uncovered for years that led Congress not to fix a time limitation on denaturalization. The House Report on the 1906 Act (H. Rep. No. 1789, 59th Cong., 1st Sess., p. 2) stated:

With the great influx of foreigners who have in recent years come to our shores and who are yearly coming in increasing numbers, and who seek naturalization under our laws, a very loose, unsatisfactory, and careless method of naturalization has grown up, leading to the grossest character of frauds against American citizenship. The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress.

The courts should not adopt a policy of limitations which Congress has deliberately rejected. Mere delay in bringing the action ought not bar the United States from bringing a denaturalization action for fraud.

The defendant is protected against the dangers that may result from delay by the heavy burden of proof which the government must sustain in making out its case for denaturalization. Its case must be

"clear, unequivocal, and convincing" (see cases cited *supra*, p. 36, fn. 8). That burden of proof provides a sufficient safeguard against denaturalization judgments founded on the time-dimmed recollection of uncorroborated witnesses. The aim of the proceeding is to deprive the defendant of privileges obtained by fraud. So long as the government can show by proof which does not leave the issue in doubt that the privileges were in fact ill-gotten, it ought to be permitted to do so: As this Court said in *Johannessen v. United States*, *supra*, 225 U.S. 227, 241-242:

An alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of citizenship could not and would not have been issued. * * *

* * * [I]f, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. * * *¹⁹

¹⁹ See also, *Knauer v. United States*, 328 U.S. 654, 673-674; *Luria v. United States*, 231 U.S. 9, 23-24; *United States v. Ness*, 245 U.S. 319, 327.

This Court's line-of-decisions requiring strict compliance with the conditions Congress has imposed as prerequisites for an award of citizenship do not suggest that the potential hardships of denaturalization should be tempered by importation into this field of alleviating doctrines. See, e.g., *United States v. Ness*, 245 U.S. 319 (cancellation of naturalization for failure to file a certificate of arrival); *Johannessen v. United States*, 225 U.S. 227 (non-compliance with the residence requirement); *United States v. Ginsberg*, 243 U.S. 472 (denaturalization because the naturalization hearing was not held in open court); *Maney v.*

3. *The lower courts have not applied any time limitations to denaturalization actions.*

Applying the doctrine that the government is not barred in asserting its remedies by the lapse of time, and noting that Congress has not chosen to limit the time within which the action must be instituted, the lower courts have consistently held that the government may begin proceedings to cancel a certificate of naturalization at any time. *United States v. Spohrer*, 175 Fed. 440, 448 (C.C.D.N.J.); *United States v. Ali*, 7 F. 2d 728, 730 (E.D. Mich.); *United States v. Parisi*, 24 F. Supp. 414 (D. Md.); *United States v. Marino*, 27 F. Supp. 155, 156 (S.D.N.Y.); *United States v. Brass*, 37 F. Supp. 698, 699-700 (E.D. N.Y.); *United States v. Kusche*, 56 F. Supp. 201, 206 (S.D. Cal.); see Cable, *Loss of Citizenship, Denaturalization, The Alien in Wartime* (1943), p. 60: "The test is not the length of time between naturalization and filing proceeding to cancel; the test is whether the certificate in its inception was procured fraudulently or illegally. If so, action to cancel may be filed at any time after naturalization." There have been other lower court cases where the lapse of time between naturalization and the filing of the complaint for denaturalization was comparable to the time-lag in this case. See *Stacher v. United States*, 258 F. 2d 112 (C.A. 9); certiorari denied, 358 U.S. 907 (1930 to

United States, 278 U.S. 17; *Lurid v. United States*, 231 U.S. 9; *Tutun v. United States*, 270 U.S. 568, 578; *Schrynn v. United States*, 311 U.S. 616. In these cases the Court has held the defendant in denaturalization proceedings to strict standards, despite possible hardship.

1953); *United States v. De Lucia*, 256 F. 2d 487 (C.A. 7), certiorari denied, 358 U.S. 836 (1928 to 1956); *Brenci v. United States*, 175 F. 2d 90 (C.A. 1) (1922 to 1946); *United States v. Ascher*, 147 F. 2d 544 (C.A. 2), certiorari denied, 325 U.S. 884 (1920 to 1943); *United States v. Failla*, 164 F. Supp. 307 (D.N.J.) (1933 to 1953); *United States v. Galato*, 171 F. Supp. 169 (M.D. Pa.) (1934 to 1954).²⁰

4. *Petitioner has shown no basis for the application of laches in his case even if that doctrine were otherwise applicable.*

Assuming, *arguendo*, that the doctrine of laches might be applicable in some denaturalization cases; there would be no reason to apply it here.

Mere lapse of time is never sufficient to establish laches; there must be a showing of prejudice as a result of the delay. *Galliher v. Cadwell*, 145 U.S. 368, 373; *Southern Pacific Company v. Bogert*, 250 U.S. 483, 488-489; *Holmberg v. Armbrrecht*, 327 U.S. 392,

²⁰ Under English law, "the Secretary of State may by order deprive any such [naturalized] citizen [of the United Kingdom and Colonies] of his citizenship if he is satisfied that the registration or certificate of naturalisation was obtained by means of fraud, false representation or the concealment of any material fact." British Nationality Act of 1948, Section 20(2), 11 and 12 Geo. 6, c. 56, 28 Halsbury's Statutes of England (2d ed.) 151. No express time limit is put on the invocation of this administrative procedure; and a recent writer on the subject seems to be of the opinion that action may be taken whenever the fraud, etc., is discovered. Parry, *Nationality and Citizenship Laws of The Commonwealth and of The Republic of Ireland* (1957), p. 330, Illustration 12, see generally, pp. 321-330. The Limitations Act of 1939, 2 and 3 Geo. 6, c. 21, as amended, is not applicable, nor is the English doctrine of laches. Franks, *Limitation of Actions* (1959), pp. 235-244.

396; *Gardner v. Panama Railroad Company*, 342 U.S. 29, 31; *Czaplicki v. The Hoegh Silverscloud et al.*, 351 U.S. 525, 533; Restatement, *Restitution*, Sec. 148.

Petitioner had the benefits of citizenship as the result of the delay, but can show no prejudice from that delay. He points to the fact (Brief, pp. 34-35) that, between the time of naturalization and the institution of denaturalization proceedings, the naturalization examiners who processed his application, the witnesses who testified on his behalf, and the judge who admitted him to citizenship have all died. But none of these deaths affects the proof in his case. There is no dispute as to the question which petitioner was asked, *i.e.*, what his occupation was. Petitioner would not seriously contend that the naturalization examiner would have been in a position to testify that petitioner was told that this question meant any legal occupation to the exclusion of his actual occupation. If petitioner understood that question to mean anything other than the primary means by which he made his livelihood, only he could furnish that proof. As to the proof of the falsity of petitioner's answer, the death of the witnesses named has no bearing. The primary proof that petitioner's statements were not only false, but wilfully false, flows from his own admissions made subsequent to his naturalization. The District Court saw the case in this posture, saying (R. 26):

* * * [I]n view of the fact that the defendant has frankly admitted, on a number of occasions, that in the period around 1925 and prior thereto, he was engaged in bootlegging,

the testimony of the individual witnesses [as to his activities] is, if anything, merely cumulative.

In this context, then, the lapse of time between admittance to citizenship and this denaturalization proceeding worked for petitioner and not against him, since he retained and enjoyed an ill-gotten benefit for a longer, rather than a shorter, period of time.²¹

III

PETITIONER'S ADMISSIONS AS TO HIS TRUE OCCUPATION AT THE TIME OF NATURALIZATION WERE NOT TAINTED BY WIRETAPPING

Petitioner's contention that some of his sworn admissions as to his occupation were tainted by wiretapping is not well-founded, for the evidence shows that there was no causal relationship between the wiretapping and the evidence relied on here. The record shows, as set forth *supra*, p. 10, fn. 3, that, pursuant to an order of a New York court, petitioner's telephone calls were intercepted during the period from May to November, 1943. While monitoring these messages, the local investigators heard a conversation between petitioner and a nominee for state judicial office. Although the local authorities had planned to interrogate petitioner before a grand jury in any event, knowledge that this conversation had taken place led to an immediate grand jury investigation

²¹ In addition, we point out *supra*, pp. 54-55, that petitioner's 1925 indictment for a prohibition violation—on which he relies for the claim that the government long ago knew sufficient facts to institute denaturalization proceedings against him—cannot be used to sustain a charge of laches.

of the judicial nomination, with the result that petitioner was called before the grand jury at an earlier date than would otherwise have been the case. While before the grand jury, petitioner was questioned as to his activities before 1930 for the purpose of showing his background, and in this connection he stated that he had been in the bootlegging business during the 1920's. District Attorney Frank Hogan, the interrogator, had not learned anything about petitioner's activities before 1930 through wiretapping, and did not give petitioner cause to believe that Hogan had learned of these activities through wiretapping. He did know petitioner's background, but he had gained that knowledge from newspaper reports, court records, and local police records.

Everything said with respect to the grand jury investigation applies as well to petitioner's interrogation before the referee appointed by the Appellate Division. Mr. Hogan had not learned of petitioner's background through wiretapping, and none of the intercepted messages related to that pre-1930 background.²² The claim that petitioner's admissions re-

²² Petitioner (Brief, pp. 39-41) makes much of the fact that the first denaturalization proceeding against him was dismissed by the District Court on the ground that the government's case was tainted by wiretapping, a ground rejected by the Court of Appeals. But this second denaturalization suit was tried in the light of *Benanti v. United States*, 355 U.S. 96, and the evidence is much different, cf. the statement of facts in the government's brief in opposition in *Costello v. United States*, No. 494, O.T. 1957.

It is true that petitioner, while before the New York grand jury in 1943, was questioned in regard to the subject of that grand jury investigation on the basis of some of the inter-

garding the illegal alcohol traffic were tainted therefore comes down to these propositions: (1) but for the wiretapping he would have been called before a grand jury at a time later than the time when he actually appeared, and in connection with another matter, and (2) this is enough to establish a causal relationship between the wiretapping and petitioner's admissions as to his past occupation.

On this basis, petitioner sought to invoke the concept of the "fruits of the poisonous tree", developed in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, and, with reference to wiretapping, in *Nardone v. United States*, 308 U.S. 338. The District Court could not accept petitioner's argument as sound, pointing out that to do so "would mean that a man whose telephone had been tapped would be granted immunity for any admissions which he thereafter made, not in the telephone conversations but in answer to any [collateral] questions in a later investigation. There is no basis for extending the rule [of the second *Nardone* case, 308 U.S. 338] to this degree" (R. 41-42).

In *Nardone v. United States*, 308 U.S. 338, this Court ruled that the prohibition of Section 605 of the Communications Act (47 U.S.C. 605) is not limited to the disclosure at trial of the contents of an intercepted communication, but extends to the divulgence of evidence obtained through derivative uses of

cepted conversations (Pet. Brief, pp. 41-43). But the admissions involved in the present case were only in the preliminary matters discussed above.

the wiretap. The Court relied upon the postulate that a broad meaning should be given the statutory terms in order to effectuate the policy formulated by Congress. 308 U.S. at 340. At the same time, however, the Court put a rein upon this method of excluding logically relevant evidence, requiring that exclusion depend upon the existence of a direct causal connection between illicit interception and offered evidence. "Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint". 308 U.S. at 341.²⁵

The situation in this case is different from that in *Nardone*—the nexus between the wiretapping by the local officers and petitioner's admissions as to his occupation is too insubstantial to justify exclusion of those admissions. True enough, petitioner perhaps might not have been brought before the grand jury and put under oath at the time that that was actually done had there been no wiretapping. But a grand jury investigation was contemplated and he would have been questioned in any event. Moreover, his admissions as to occupation were elicited during general ques-

²⁵ Nothing said in *Goldstein v. United States*, 316 U.S. 114, is pertinent to this point, since there it was assumed that a causal connection existed between the wiretapping and the testimony offered at trial (*id.* at 117). The Court went on to hold that the defendants lacked standing to challenge the offered evidence, since they were not parties to the intercepted communications (*id.* at 122).

tioning as to his background, that questioning was collateral to the grand jury inquiry, and the questioner's knowledge of that background came from an untainted source. And, in actual fact, there is no room at all for the argument that petitioner might not have admitted his past unlawful occupation if questioned at a later time, since he disclosed that information during the course of other proceedings, held both before and after 1943—proceedings where there was no suggestion of wiretapping.

In terms of causation, the present situation is analogous to *United States v. Bayer*, 331 U.S. 532, and *Lyons v. Oklahoma*, 322 U.S. 596, where the Court held that the fact that a first confession was inadmissible because of coercion (or lack of voluntariness) would not render inadmissible a second confession voluntarily made—rather than to *Nardone, supra*; *Silverthorne, supra*; and *Weiss v. United States*, 308 U.S. 321. In *Bayer*, the Court noted (331 U.S. at 540–541) that a later confession always may be looked upon as the fruit of an earlier inadmissible confession, since the defendant suffers certain psychological and practical disadvantages as the result of confessing. In a sense, then, the earlier statement is invariably at least one of the complex of factors leading to a second act of incrimination. But under *Bayer* the second statement is not deemed the poisoned fruit of the first so long as the first inadmissible statement is not the primary causative factor.

In *United States v. Remington*, 208 F. 2d 567, 569–570. (C.A. 2), certiorari denied, 347 U.S. 913, the de-

defendant was convicted of perjury committed during the course of his trial on a perjury indictment founded on false statements made before a grand jury. On appeal, he contended that the government had procured his indictment for perjury before the grand jury through illegal conduct, and invoked the doctrine of *Nardone v. United States, supra*, and *Silverthorne Lumber Co. v. United States, supra*, that "knowledge gained by the Government's own wrong cannot be used by it * * *", *id*, 251 U.S. at 392. He contended that he never would have been in court but for the illegally procured indictment, and thus would not have given the false testimony of which he was convicted. The Court of Appeals assumed "that the first indictment is bad because of misconduct in the grand jury proceedings" (208 F. 2d at 569), but held that there was no, or at least an insufficient, causal connection "between the government's wrong and the defendant's act of perjury during the trial" (208 F. 2d at 570).

In *Bayer, Lyons, and Remington*, there were volitional acts by the defendant which cut across the causal tie. Here, there never was a direct causal relationship. Petitioner's telephone calls were not intercepted for the purpose of learning about his source of livelihood before 1930, nor was he called before the grand jury for the purpose of uncovering that past illegality. His admissions as to his occupation during the prohibition era were thus neither derived from, nor induced by, the interception. Such connection as existed had become too attenuated to call for application of the *Nardone* rule.

IV

PETITIONER SHOULD NOT BE PERMITTED TO AMEND HIS PETITION FOR A WRIT OF CERTIORARI SO AS TO RAISE BELATEDLY THE ISSUE OF *RES JUDICATA* WHICH HE CONTESTED BEFORE BOTH LOWER COURTS BUT CHOSE NOT TO SET FORTH IN HIS ORIGINAL PETITION

On April 15, 1960, petitioner filed a motion for leave to amend the petition for a writ of certiorari which he had filed on March 18, 1960, so as to include a question of *res judicata* not raised in the petition as originally filed. On May 16, 1960, this Court granted the petition and assigned the motion for leave to amend for argument together with *United States v. Lucchese*, No. 57, this Term, in which certiorari was granted. We discuss in this Point the fact that petitioner has not shown any valid reason for raising the issue so belatedly—two days before the government's response to the petition for certiorari was due. Under Point V, *infra*, pp. 71-80, we point out that the question sought to be raised was correctly decided by the court below.

The issue raised in petitioner's motion to amend stems from the history of the prior denaturalization suit against petitioner. In that prior action, an affidavit of good cause was not filed simultaneously with the complaint. The District Court, for reasons not pertinent here, dismissed the cause without prejudice to the government's right to institute a new proceeding on the same ground. 145 F. Supp. 892, 897. This judgment was reversed by the Court of Appeals. 247 F. 2d 384. When the Court of Appeals' judgment

was reviewed here on certiorari, this Court reversed for a reason not considered by the Court of Appeals, i.e., that the affidavit of good cause had not been filed with the complaint. 356 U.S. 256. The Court remanded the cause to the District Court with directions "to dismiss the complaint". 356 U.S. 256.

After remand; the government presented to the District Court a proposed order for dismissal "without prejudice." The District Court, however, felt constrained by the mandate of this Court merely to enter an order of dismissal which did not specify whether it was with or without prejudice. The government did not appeal from this order (R. 253).

After the present, separate, denaturalization action had been instituted in the District Court, petitioner moved to dismiss the complaint on the ground that the dismissal of the prior proceeding barred the instant action on principles of *res judicata*. He argued that, under Rule 41(b) of the Rules of Civil Procedure,²⁴ the order of dismissal, since it did not specify that it was "without prejudice," operated as an adjudication on the merits, and that the government, if it had wished to avoid such effect, should have appealed from the District Court's order on remand. This contention was overruled by the District Court on February 20, 1959, on the ground that the dismissal of the prior action was for lack of jurisdiction in the sense that

²⁴ Rule 41(b), *supra*, pp. 4-5, provides: " * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

that term is used in Rule 41(b) (R. 34-35; 171 F. Supp. 10, 22).

On appeal, petitioner renewed his contention that the dismissal of the prior action operated as a dismissal with prejudice and therefore barred the present suit. Without deciding what is or is not a dismissal for lack of jurisdiction within the purview of Rule 41(b), the Court of Appeals ruled that the dismissal of the prior proceeding, pursuant to the mandate of this Court, did not operate to bar the present action. It stated (R. 254-255):

It seems to us that Rule 41(b) should be interpreted as applying only to cases in which the trial judge is exercising some discretion and is not merely acting mechanically pursuant to the direction of a superior court. There must be a rule that a bare "dismissal" is to be interpreted as either with or without prejudice, and 41(b) provides this rule in all cases where the district court has a real discretion in the matter. But there is obviously no such need where the trial court's disposition of the case has been predetermined by a superior court. It would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits. Appellant's arguments exalt pure technicalities to a wholly unwarranted degree. * * *

In the course of its opinion, the Court of Appeals also said (R. 253):

There may have been an error by the district court in its refusal to add the words, proposed by the government, that the dismissal of the

complaint should be "without prejudice". However, this error, if it was an error, could have been corrected on appeal, and no appeal was taken from the district court's order of dismissal.

In the petition for a writ of certiorari, filed by petitioner on March 18, 1960, he did not attack the ruling of the Court of Appeals that the prior dismissal failed to bar the present action. His alleged reason for attempting to do so a month later (in his motion to amend the petition) was that the Solicitor General, by filing a petition for a writ of certiorari in *United States v. Lucchese*, No. 57, this Term, had indicated that "the nature and effect of dismissals entered pursuant to the mandate of a higher court raise serious questions which should be resolved by this Court" (Motion, p. 3). However, as appears from our petition and brief in *Lucchese*,²⁵ the government has consistently taken the position in *Lucchese* that it was merely attempting to protect its rights in the event of an adverse decision by this Court in the present case if petitioner's certiorari petition should raise the *res judicata* issue and this Court accept it. We did not consider the issue worthy of review in itself. Indeed, since petitioner's original petition did not raise this question, the government had already moved to dismiss its *Lucchese* petition before it was

²⁵ The *Lucchese* petition for certiorari had to be filed by the government before petitioner had filed his petition, at a time when we did not know what questions petitioner would present to this Court.

served with, or had heard about, petitioner's present motion. There is therefore no reason to relieve petitioner of the consequences usually flowing from a failure to raise an issue of which he is fully aware.

We do not question the power of the Court to grant petitioner's motion to amend, and to consider the *res judicata* issue on its merits—especially since the motion was filed within the 90-day period for filing a petition for certiorari. But we do argue that petitioners should not be allowed to supplement their petitions by raising new questions after filing their original petitions unless they show good reason for failing to present the new question at the proper time. The orderly presentation to, and decision by, this Court of certiorari petitions would be much disrupted if parties were free to supplement their petitions by amendments and additions raising new issues. The Court's rules and practice do not contemplate such a procedure (see Rules 23(1)(c) and 40(1)(d)), and we submit that it should not be countenanced unless very good cause is shown. In this case, petitioner has shown no cause whatever for failing to raise the issue of *res judicata* in his petition. His reliance on the government's petition in *Lucchese* is wholly unwarranted, as we have shown, and he points to nothing else excusing his failure.

A SECOND DENATURALIZATION PROCEEDING IS NOT BARRED BY THE FAILURE OF THE DISTRICT COURT TO SPECIFY, IN THE ORDER DISMISSING THE ORIGINAL DENATURALIZATION COMPLAINT, THAT THE DISMISSAL IS WITHOUT PREJUDICE TO THE FILING OF A NEW COMPLAINT, WHERE THE DISMISSAL WAS ENTERED AT THE DIRECTION OF THIS COURT FOR FAILURE TO FILE THE AFFIDAVIT OF GOOD CAUSE WITH THE COMPLAINT

In *United States v. Zucca*, 351 U.S. 91, this Court, in reliance upon the wording of Section 340(a) of the 1952 Act, held that the filing of a contemporaneous affidavit of good cause is an essential procedural prerequisite to initiation and maintenance of a denaturalization proceeding, *id.*, at 99, 100. On the basis of this ruling, this Court reversed *Costello v. United States* (together with *Matles v. United States*, and *Lucchese v. United States*) 356 U.S. 256, and remanded the case to the District Court with directions that the trial court dismiss the complaint (*id.*, at 257). The district judge, believing that he was bound to follow the mandate and powerless to go beyond its express terms, entered an order dismissing the complaint without specifying whether the dismissal was to be considered as with or without prejudice (R. 253).

Rule 41(b), F. R. Civil P., *supra*, pp. 4-5, concerns itself with the effect of an involuntary dismissal of an action. It provides, *inter alia*, that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this sub-division, and any dismissal not provided for in this rule, other than a dismissal for

lack of jurisdiction or for improper venue, operates as an adjudication upon the merits." It is petitioner's position (Brief, pp. 44-49) that the dismissal ordered by this Court operated as an adjudication upon the merits, and bars the present action on principles of *res judicata*. The government's answer is that the dismissal of the earlier complaint was for failure to comply with a *quasi*-jurisdictional requirement, and that this is a dismissal for "lack of jurisdiction" within the meaning of Rule 41(b). We also show that the Court of Appeals was justified in its view that Rule 41(b) ought to be restricted to situations where the District Court exercises, or purports to exercise, some measure of discretion in its ruling.²⁰

A. *The dismissal of the first action was for lack of jurisdiction, as that term is used in Rule 41(b), F.R. Civil P.*

1. *The dismissal was for a quasi-jurisdictional defect.*

"Jurisdiction" is a word of shifting meaning covering a large field. In one sense, it refers to the power of the court to act in a particular case. A court acts without jurisdiction when it undertakes to decide a case of a class which is not within its competence—as where a federal court undertakes to punish a state

²⁰ Because an issue had been raised by petitioner in this case as to the *res judicata* effect on the merits of the government's failure to appeal the order dismissing the first action, the government did appeal in *Lucchese*. In *United States v. Lucchese*, No. 57, this Term, we point out that this Court contemplated a dismissal without prejudice when it reversed the prior suit, that the District Court had the power to enter a judgment specifically so providing, and that it erred when it failed to do so.

crime committed on state territory. A court also acts without jurisdiction where there has been no valid service of process and the defendant has not submitted to the jurisdiction of the court. This is basic fundamental jurisdiction. An attempt by a court to act without this type of bedrock jurisdiction is invalid, and judgments entered under such circumstances are subject to collateral attack. Petitioner argues, and we agree, that the failure to file an affidavit of good cause is not the kind of condition which goes to the very core of the denaturalization proceeding so that a judgment rendered without compliance therewith would be subject to collateral attack as beyond the competence of a District Court. *Title v. United States*, 263 F. 2d 28, 30 (C.A. 9), certiorari denied, 359 U.S. 989; *United States v. Failla*, 164 F. Supp. 307, 313-315 (D.N.J.).

That, however, is not the only sense in which the term jurisdiction is used. "Jurisdiction" is a term also applied to conditions precedent to a decision by the federal court on the merits of the controversy which, if raised in the original action, bar a decision on the merits, even though lack of compliance therewith will not subject a final judgment to collateral attack. As this Court put it in *Noble v. Union River Logging Railroad Company*, 147 U.S. 165, 173-174, after discussing what it regarded as minimal jurisdiction requirements:

There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but

which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. * * * [In such cases] the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act.

Thus, lack of diversity of citizenship is a proper basis for a motion to dismiss for lack of jurisdiction when asserted in the main action, *Belly v. Tribune-Star Publishing Company*, 152 F. 2d 267-268 (C.A. 7); *Kern v. Standard Oil Company*, 228 F. 2d 699, 701 (C.A. 8); but an otherwise valid decree may not be collaterally attacked for that reason. *Des Moines Navigation and Railroad Company v. Iowa Homestead Company*, 123 U.S. 552, 556-559; *McCormick v. Sullivan*, 10 Wheat. 192, 199. Such decrees "are not absolute nullities" (*ibid*). Similarly, a motion to dismiss, filed in the main action, for lack of "jurisdiction over the subject matter" should be granted where the damages claimed for breach of contract is less than the minimum amount required by statute (28 U.S.C. 1332), *Gibbs v. Buck*, 307 U.S. 66, 72; *Parmelec v. Ackerman*, 252 F. 2d 721 (C.A. 6); but such a defect, when not raised, does not render the judgment or decree null and void. *In Re Sawyer*, 124 U.S. 200, 220-221; see *International News Service v. Associated Press*, 248 U.S. 215, discussed in *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279.

The failure to file an affidavit of good cause at the time when the complaint is filed in a denaturalization suit is a defect of this character; it amounts to what the courts have called a *quasi-jurisdictional* defect.

It is sufficiently jurisdictional to be available to the defendant so long as the case pends on direct review, *Costello v. United States, supra*, 356 U.S. 256, even though, not being a defect which goes to the power to deal with the subject matter of the action or the jurisdiction over the parties, it is not a defect which would render a judgment subject to collateral attack.

2. "Lack of jurisdiction," as that term is used in Rule 41(b), includes dismissal for a quasi-jurisdictional defect.

We think it is evident that, when Rule 41(b) provides that dismissals for lack of jurisdiction shall not operate as a dismissal with prejudice, it encompasses dismissals for quasi-jurisdictional defects such as the absence of an affidavit of good cause. The manifest purpose of the Rule's exception for dismissals for lack of jurisdiction or venue is not to foreclose a party who has not had an adjudication on the merits of his claim or an opportunity to adjudicate the merits.²⁷ Certainly, dismissal of a complaint for failure to file an affidavit of good cause in no sense involves an adjudication on the merits.

Moreover, since the rule is directed toward regulation of practice in a pending case, it is naturally read as relating to all those matters which constitute the "jurisdiction" of the court to proceed with the pending case rather than as being limited to those basic jurisdictional matters which are always available, even on

²⁷ To the extent that the rule authorizes dismissal with prejudice for lack of prosecution or failure to comply with an order, it allows a court to penalize one who, by his dilatory tactics, in effect prevents adjudication.

collateral attack. As noted *supra*, there are a number of requirements, such as diversity of citizenship or amount in suit, which are considered "jurisdictional defects" when attacked directly, although they do not form a proper basis for collateral attack. Dismissals "for lack of jurisdiction", within the meaning of Rule 41(b), in the normal course of events, are rulings which are responsive to motions made on an appropriate jurisdictional ground under Rule 12(b). See *Galdi et al. v. Jones et al.*, 141 F. 2d 984, 992 (C.A. 2). The latter Rule states, *inter alia*, that:

Every defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party.

It is evident that one may move to dismiss for lack of jurisdiction under Rule 12(b) on a quasi-jurisdictional, as well as on a basic jurisdictional, ground. *E.g.*, *Gibbs v. Buck*, 307 U.S. 66, 72, and other cases discussed *supra*, p. 74. *Madden v. Perry*, 264 F. 2d 169 (C.A. 7), certiorari denied, 360 U.S. 931, illustrates our views as to Rule 41(b). There, the Regional Director for the Thirteenth Region of the National Labor Relations Board had filed a petition for injunction against the defendant, alleging the com-

mission of an unfair labor practice under 29 U.S.C. 158(b)(4)(A). 29 U.S.C. 160(1) requires the Regional Director to conduct a preliminary investigation before filing such a petition. The defendant asserted that no preliminary investigation had been conducted; the Regional Director refused to say anything about the matter; and the District Court dismissed the petition for injunction on the ground that the Regional Director had no right to maintain the action. Later the District Court attempted to enter supplemental findings disposing of the Regional Director's petition on its merits. The Regional Director sought, in the Court of Appeals, a writ of mandamus directing the District Court to vacate its supplemental findings. The Court of Appeals issued the writ of mandamus, holding that the original order of dismissal was a final order which did not involve the merits of the case and that the supplemental findings were therefore not germane to any pending action. The court went on to hold squarely that the dismissal for failure to fulfill a condition precedent to the right to maintain the action was a dismissal for "lack of jurisdiction" within the meaning of Rule 41(b), F.R. Civil P. "[T]he dismissal was based upon a failure of a jurisdictional requirement, which is expressly excepted from the operation of rule 41(b) [as an adjudication on the merits]." 264 F.2d 174-175.

The failure to file an affidavit of good cause was the basis for a motion to dismiss for lack of "jurisdiction of the subject matter of the action" in *Lucchese v.*

United States, 356 U.S. 256, and *United States v. Diamond*, 356 U.S. 257 (No. 450, O.T. 1957, R. 23, 28, 34; No. 771, O.T. 1957, R. 20, 22).²⁸ This Court's ruling in those cases was a holding that such motions for lack of "jurisdiction of the subject matter" should have been granted. The order of dismissal pursuant to the mandate of this Court was therefore a dismissal for "lack of jurisdiction" under Rule 41(b).

B. Rule 41(b) applies only to those cases where the District Court purports to exercise some discretion in ordering an involuntary dismissal with prejudice.

As we have set forth in the Statement, *supra*, pp. 15-16, the Court of Appeals reasoned that Rule 41(b) should apply only to cases in which the trial court exercises some discretion in ordering a dismissal. It noted that there must be some guide to interpreting "a bare 'dismissal' ", and that the Rule furnished such a guide in all cases where the trial court has a real discretion in deciding the effect of the order to be entered. In a case such as this, however, where a superior court has directed the entry of a dismissal and the District Court believes itself powerless to add anything at all to the order of dismissal, "it would be a violation of the intention of all the courts concerned if the dismissal of the earlier complaint were held in this case to be a judgment on the merits" (R. 255).

The Court of Appeals' conclusion—that Rule 41(b)

²⁸ The District Court's original dismissal without prejudice in *United States v. Costello*, 145 F. Supp. 892, was based on the ground that the government's evidence and the affidavit of good cause were tainted by wiretapping. See *supra*, pp. 5-6, fn. 2.

applies only to discretionary rulings—is supported by the logic of the Rule itself. Rule 41(b) expressly treats three situations as grounds for “dismissal under this subdivision” (*supra*, pp. 4-5): (1) failure to prosecute, (2) failure to comply with the rules or any order of court, and (3) failure, upon the facts and the law, to show a right to relief. In all of these situations, the trial court is called upon to exercise a measure of discretion, and the defect alleged, if actually shown to exist, is sufficiently serious to warrant judgment on the merits against the plaintiff. See *United States v. Procter & Gamble Company, et al.*, 356 U.S. 677, 679-680; *Shaffer v. Evans*, 263 F. 2d 134, 135 (C.A. 10), certiorari denied, 359 U.S. 990; *Edmond v. Moore-McCormack Lines, Inc.*, 253 F. 2d 143, 144 (C.A. 2); *Garden Homes, Inc. v. Mason*, 249 F. 2d 71, 72 (C.A. 1); *Feinberg v. Leach*, 243 F. 2d 64, 67-68 (C.A. 5). And dismissals “not provided for in this rule”, but bound by its terms as to prejudice, also involve the exercise of discretion, or at least the exercise of a power to decide the terms of the order, by the District Court. See *Societe Internationale v. Rogers*, 357 U.S. 197, 213 (dismissal under Rule 37, for noncompliance with production order, held a matter of discretion, but not justified when plaintiff attempts good-faith compliance); *Weeks v. Barco*, 125 F. 2d 84, 87, 93-95 (C.A. 7) (District Court has discretion as to whether an action may be maintained as a class action under Rule 23).

In *United States v. Lucchese*, No. 57, this Term, we argue that the District Court erred in entering a bare

dismissal when the earlier denaturalization case was returned to the trial forum, in that this Court's decision in *Costello v. United States*, 356 U.S. 256, contemplated, and applicable precedents permitted, the addition of the words "without prejudice". But from the point of view of the district judge, who believed that he lacked power to go beyond the words of the mandate at all, the entry of the order of dismissal was a purely mechanical act. It did not involve the exercise of any discretion, did not depend upon the existence of any intentional fault on the part of the government (such as failure to prosecute or obey a court order), was not related to, and did not express any view as to, the merits of the case. To say that Rule 41(b) applies to such an order is, in the words of the Court of Appeals, to "exalt pure technicalities to a wholly unwarranted degree" (R. 255).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed, and that petitioner's motion to amend his petition for a writ of certiorari should be denied.

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OCTOBER 1960.

SUPREME COURT OF THE UNITED STATES

No. 59.—OCTOBER TERM, 1960.

Frank Costello, Petitioner.	} On Writ of Certiorari to the	
United States of America.		United States Court of
		Appeals for the Second
		Circuit.

[February 20, 1961.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner became a naturalized citizen on September 10, 1925. The District Court for the Southern District of New York revoked his citizenship on March 9, 1959, in this proceeding brought by the Government under § 340 (a) of the Immigration and Naturalization Act of 1952. That Act authorizes revocation of naturalized citizenship "on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation" The petitioner, in 1925, swore in his

¹ The statute, 66 Stat. 260, as amended, 68 Stat. 1232, 8 U. S. C. § 1451, reads in pertinent part as follows:

"(a) *Concealment of material evidence; refusal to testify.*

"It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively."

Preliminary Form for Naturalization, in his Petition for Naturalization, and when he appeared before a Naturalization Examiner, that his occupation was "real estate." The District Court found that this was "willful misrepresentation and fraud" and that "his true occupation was bootlegging." 171 F. Supp. 10, 16. The Court of Appeals for the Second Circuit affirmed, 275 F. 2d 355. We granted certiorari. 362 U. S. 973.

An earlier denaturalization complaint brought under 8 U. S. C. (1946 ed.) § 738 (a), the predecessor of § 340 (a), was dismissed on the ground that wiretapping may have infected both the Government's affidavit of good cause and its evidence. *United States v. Costello*, 145 F. Supp. 892. The Court of Appeals for the Second Circuit reversed on the ground that the Government should have been afforded an opportunity to show that its evidence either was untainted or was admissible in any event. 247 F. 2d 384. We granted certiorari and reversed, 356 U. S. 256, on a ground not considered below, namely, that the affidavit of good cause, which is a prerequisite to the initiation of denaturalization proceedings under § 340 (a), *United States v. Zucca*, 351 U. S. 91, was not filed with the complaint. On remand the District Court declined to enter an order of dismissal "without prejudice" and entered an order which did not specify whether the dismissal was with or without prejudice. The Government did not appeal from that order but brought this new proceeding under § 340 (a) by affidavit of good cause and complaint filed on May 1, 1958.

The petitioner argues several grounds for reversal of the order revoking his citizenship. He contends: (1) that the finding that he willfully misrepresented his occupation is not supported by clear, unequivocal, and convincing evidence, the standard of proof required of the Government in these cases; (2) that some of his admissions as to his true occupation at the time of his naturalization were

tainted by wiretapping, and thus were not evidence which the District Court might rely upon in reaching its conclusion; (3) that in the circumstances of this case the lapse of 27 years from the time of the petitioner's naturalization to the time of the filing in 1952 of the Government's first complaint should be deemed to bar the Government from instituting this proceeding; (4) that the second denaturalization proceeding was barred under Rule 41 (b) of the Rules of Civil Procedure by the failure of the District Court on remand of the first proceeding to specify that the dismissal was "without prejudice" to the filing of a new complaint.

We find no merit in any of these contentions. The judgment of the Court of Appeals will be affirmed.

I.

The Government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship. American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years. See *Schneiderman v. United States*, 320 U. S. 118, 122-123; *Nowak v. United States*, 356 U. S. 660, 663. In *Chaunt v. United States*, 364 U. S. 350, 352-353, we said:

"Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to

The District Court also found that the petitioner knowingly and willfully swore false allegiance to the Constitution and laws of the United States. Like the Court of Appeals, 275 F. 2d, at 360, we find it unnecessary to pass upon the petitioner's attack upon this finding, since we think that the revocation of his citizenship on the first ground was clearly correct.

give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

"On the other hand, in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must, indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.' *Schneiderman v. United States*, 320 U. S. 118, 125, 158; *Baumgartner v. United States*, 322 U. S. 665, 670. The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here"

In 1925 a known bootlegger would probably not have been admitted to citizenship. Decisions before and after the repeal of the Eighteenth Amendment held that the applicant who trafficked in the sale, manufacture, or transportation of intoxicating liquors during Prohibition, within the five years preceding his application, did not meet the statutory criterion that an applicant must have behaved as a person "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Act of 1906, § 4, 34 Stat. 596, 598.

In *United States v. De Francis*, 50 F. 2d 497, 498, the Court of Appeals for the District of Columbia stated: "Any person who violates the provisions of the Prohibition Act violates the principles of the Constitution of the United States, and cannot be held to be attached to the

principles of the Constitution of the United States. Nor can it be said that such a person possesses good moral character."

In *Turlěj v. United States*, 31 F. 2d 696, 699, it was said, "Few cases can be found where applicants for citizenship have been admitted, if guilty of violating liquor laws within the five years preceding the hearing, and such cases have been severely criticized by the courts. This was true even before the adoption of the Eighteenth Amendment as a part of our national Constitution." See also *In re Trum*, 199 F. 361.

In *United States v. Villaneuva*, 17 F. Supp. 485, 487, the court said, "Courts have quite universally held that violations of prohibition liquor laws, whether national or state, should be taken into consideration in determining questions respecting the good moral character of applicants for citizenship and their attachment to the principles of the Constitution of the United States."

In *United States v. Mirsky*, 17 F. 2d 275, a denaturalization case, Judge Thacher of the District Court for the Southern District of New York, who had admitted Costello to citizenship less than a year earlier, said: "One who deliberately violates the Eighteenth Amendment of the Constitution cannot be said to be attached to the principle declared by that amendment." P. 275. "Neither the fact that in this and in other communities there are many citizens who are not attached in thought or deed to the principle embodied in the Constitution by the Eighteenth Amendment, nor the fact that opposition to that principle with a view to removing it from the Constitution is quite generally thought to be the part of good citizenship, can relieve this court of its duty to apply the law as it is now written." P. 276.

See also *In re Nagy*, 3 F. 2d 77; *In re Raio*, 3 F. 2d 78; *In re Phillips*, 3 F. 2d 79; *In re Bonner*, 279 F. 789; *Ex parte Elson*, 299 F. 352.

Some of these cases turned on a finding of illegal procurement of the certificate because of demonstrated lack of attachment to the principles of the Constitution rather than upon "fraud" under 8 U. S. C. § 738 (a). However, the cases demonstrate the materiality of the concealment by the petitioner of his bootlegging if that in fact was his true occupation. Such concealment would support the conclusion that he was an applicant who had "[s]uppressed or concealed facts . . . [which] . . . if known,

Section 340 (a) authorizes denaturalization on the single ground of "concealment of a material fact or . . . willful misrepresentation." Its predecessors, § 338 (a) of the Immigration Act of 1940, and § 15 of the original Act of Congress in 1906 giving statutory basis for denaturalization, authorized denaturalization for "fraud" or illegal procurement. The change from "fraud" to "concealment of a material fact or . . . willful misrepresentation" apparently was made primarily to remove doubt as to whether denaturalization could be based on so-called "intrinsic" fraud, fraud through false swearing in the naturalization proceedings, or only on the traditional equity ground for cancellation of a judgment, "extrinsic" fraud, inhering in activities collateral to the proceedings themselves such as the concealment of witnesses from the court. Certain lower court cases had indicated that only extrinsic fraud might be encompassed within the term, compare *United States v. Kusche*, 56 F. Supp. 201, with *United States v. Hauck*, 155 F. 2d 141, in accordance with the rule that had apparently been applied to revocation of a judgment admitting to citizenship prior to the Act of 1906, see *United States v. Gleason*, 90 F. 778; cf. *United States v. Norsch*, 42 F. 417. Congress thus acted in 1952 to make it clear that false statements in the course of the naturalization proceedings could be the basis for revocation of citizenship. See S. Rep. No. 1515, 81st Cong., 2d Sess. 756-769. But there appears no congressional purpose to lay down a looser definitional standard for "willful misrepresentation" or laxer requirements of proof than had previously been applied by the courts which held misstatements during naturalization proceedings to constitute fraud under the prior statutes. The practice of the Immigration and Naturalization Service apparently treated "fraud" under the older Acts as involving willful misrepresentation or concealment of material facts. See S. Rep. No. 1515, 81st Cong., 2d Sess. 756.

might in and of themselves justify denial of citizenship." *Chaunt v. United States, supra*, at 352-353.

We have examined the record to determine if the evidence leaves "the issue in doubt." *Schneiderman v. United States*, 320 U. S. 118, 158, whether the petitioner procured his naturalization by willfully misrepresenting that his occupation was real estate. It does not. However occupation is defined, whether in terms of primary source of income, expenditure of time and effort, or how the petitioner himself viewed his occupation, we reach the conclusion that real estate was not his occupation and that he was in fact a large-scale bootlegger.

The Government built its case on a solid foundation of admissions made by the petitioner in several federal and New York State inquiries beginning in 1938. In that year he admitted to a Special Agent of the Bureau of Internal Revenue that he had engaged in the illicit liquor business from 1923 or 1924 until a year or two before the repeal of the Eighteenth Amendment in 1933. In 1939 he testified before a federal grand jury in the Southern District of New York that "I did a little bootlegging. . . . The last time was around 1926." In 1943 he testified before a New York County grand jury that he had been in the liquor business in the twenties and had an office at 405 Lexington Avenue, New York City, as early as 1925. He also admitted that he had reported an aggregate income of \$305,000 for New York State income tax purposes for the years 1919 to 1932 and that "[m]aybe most of it" was earned in the bootlegging business. Indeed, except for \$25,000 realized from a real estate venture to be discussed shortly, there was no evidence of income from any legitimate business. In 1943, in a proceeding before an Official Referee of the Appellate Division of the Supreme Court of New York he acknowledged that money he had lent to Arnold Rothstein, prior to the

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latter's murder in 1928, might have been derived "from a little bootlegging"; he also admitted that during the Prohibition era his business of smuggling alcoholic liquors into the United States was "profitable." In 1947 he appeared before the New York State Liquor Authority and testified that from 1923 to 1926 he operated a bootlegging business from 405 Lexington Avenue.

Several of his associates in bootlegging enterprises presented a picture of large-scale operations by the petitioner from early in Prohibition past the time of his application for citizenship. Emmanuel Kessler, a big operator apprehended in 1923 and convicted for his activities, financed, about 1921, the petitioner's purchase of trucks to haul Kessler's liquors after Kessler landed them on Long Island from boats on the high seas. Kessler "very often" discussed shipments with the petitioner in telephone calls to the Lexington Avenue office. Kessler's volume at the time was about 3,000 cases per week and he paid the Costello organization approximately \$6,000 a week for haulage and storage. Kessler said that before he began serving his sentence "Frank Costello personally asked me . . . for some money so he could continue on. I think I left him either 100 or 200 cases."

Frank Kelly, who began bootlegging about 1922, smuggled liquors into the country using a chartered ship which he moored off the Long Island shore. He became associated with the petitioner in 1925 when he was introduced to the petitioner and the petitioner's Canadian representative, Harry Sausser, at Montauk, Long Island. On this occasion, Sausser negotiated with Kelly for the storage of liquors on Kelly's boat. Kelly was one of a combine including the petitioner which was indicted in 1925 for conspiracy to violate the liquor laws.

Phillip Coffey, also indicted with the petitioner in 1925, was a former Kessler employee. He purchased liquor from the Costello organization at 405 Lexington Avenue as early as 1922 or 1923. He insisted that he did "all my

business with Eddie Costello," the petitioner's brother, but admitted placing orders with Edward in the petitioner's presence and discussing purchases with the petitioner. Coffey told of an occasion, which he thought occurred in 1925, when Kelly and the petitioner came by automobile to Montauk Point and Kelly gave him instructions for the removal of liquor from Kelly's chartered schooner. He said that he was paid for his services at petitioner's Lexington Avenue office by Edward Ellis, the petitioner's bookkeeper.

Albert Feldman, another admitted bootlegger, started in 1920 and dealt with both the petitioner and Kessler. He arranged with the petitioner about 1924 at the Lexington Avenue office to have the petitioner haul and store some liquor for him. He also talked with the petitioner regarding its sale. The petitioner told Feldman he had "a customer for the 1000 cases," that he "could sell them and he would be able to pay me in a few days, as soon as they were delivered, to which I agreed; and Frank said that 'I'll be responsible for the money.'" In regard to the petitioner's role in liquor transactions, Feldman said, "everything was Frank Costello. He was the businessman. He did all the business."

Helen L. Sausser, daughter of Harry Sausser, was 18 when she became acquainted with the petitioner in 1925. Sausser was one of the two persons who executed the affidavit attached to the petitioner's Petition for Naturalization and swore that he also was in the real estate business. The daughter recalled overhearing conversations between petitioner and her father about liquor, and said that her father admitted to her mother that he was engaged in bootlegging. The daughter testified that she had never known her father to engage in the real estate business.

Despite these strong proofs of the falsity of the petitioner's answers, the petitioner insists that the evidence derived from the Government's own investigation of his

activities in the real estate business should leave us with a troubling doubt whether he stated falsely that he was engaged in that occupation. He had told the New York grand jury in 1943, when asked what "other occupation" besides bootlegging he followed during Prohibition, that "I was doing a little real estate at that time." The Government put in evidence in this proceeding state corporate records and records from the Registries of Deeds in New York City. These show that petitioner was indeed identified with three corporations empowered to engage in the purchase and sale of real estate. We dismiss two of the corporations, organized in 1926, without further mention beyond the fact that the petitioner testified before the Official Referee in the Appellate Division that his investment of \$25,000 or \$30,000 in one of them came from "bootlegging or gambling"; there was no evidence of any real estate transactions involving either company. The petitioner's contention must therefore be tested in the light of the activities of Koslo Realty Corporation. This corporation was organized in December 1924 and at least as early as August 1925 listed its address as the petitioner's office, 405 Lexington Avenue. A December 1925 document lists the petitioner as president of the company. The only evidence of any investment by the petitioner or profitable transaction in which he engaged before May 1, 1925, when he filed his Petition for Naturalization, concerned a property at West End Avenue and 92d Street, Manhattan, acquired by the corporation in December 1924. The petitioner admitted before the New York County grand jury that his investment in that transaction was from earnings in "gambling or liquor" and claimed that he made a profit of \$25,000 on the sale of the property in June 1925. The only other transactions occurred after May 1, 1925. The corporation bought lots in the Bronx in August and October 1925. Some of the lots were improved and all of them were sold in 1926.

These proofs raise no troubling doubt in our minds. They do not support an inference that his occupation was real estate. They show only that the petitioner invested his illicit earnings in real estate transactions with the hope of profit. But he was neither deriving his principal income from Koslo Realty Corporation, spending any appreciable time conducting its affairs, nor making it his central business concern. He himself admitted that he operated his bootlegging enterprises from the Lexington Avenue address. All of the witnesses who testified to activities at that address recounted bootlegging transactions and not one in real estate. And the postman who delivered mail to the office from 1924 to 1926, and saw the petitioner there several times a week, saw neither a secretary nor typewriter as might be expected in an active real estate business.

The Government's proofs show not merely that the petitioner's statements were factually incorrect, but show clearly, unequivocally, and convincingly that the statements were willfully false. The petitioner argues that the evidence is susceptible of the inference that he may have believed that the questions called for the disclosure only of a legal occupation. We may assume that "occupation" can be a word of elusive content in some circumstances, like the question involved in *Nowak v. United States*, *supra*, and *Maisenberg v. United States*, 356 U. S. 670, upon which decisions the petitioner relies. But that argument of ambiguity is farfetched here. No one in the petitioner's situation could have reasonably thought that the questions could be answered truthfully as they were. It would have been a palpable absurdity for him to think that his occupation was real estate; he actually had no legal occupation. On this record, his only regular and continuing concern was his bootlegging upon which he depended for his livelihood. He only dabbled in real estate and by his own admission financed even this side-

line from "liquor or gambling." We need not determine whether the evidence supports the conclusion that petitioner organized Koslo Realty Corporation to provide him with a facade or front to mislead the law-enforcement authorities as to his true occupation, although the appearance of a legitimate occupation was obviously convenient for him and his group. We are convinced, however, that the petitioner counted upon the corporation to give plausibility to his representation as to his occupation when he applied for citizenship.

Our conclusion that his representations were willfully false is reached without reliance upon an inference from the failure of the petitioner to take the stand in this proceeding and testify in his own behalf. The Court of Appeals made some comments as to the significance of the petitioner's failure to testify, 275 F. 2d, at 358, but we do not read its opinion as basing the affirmance of the District Court's order upon such an inference. The district judge, whose order the Court of Appeals affirmed, made none. The evidence so strongly supports the District Court's conclusion that the aid of the inference was unnecessary to buttress it. We therefore find it unnecessary to decide in this case whether an inference may be drawn in a denaturalization proceeding from the failure of the defendant to present himself as a witness.

II.

The contention that illegal wiretapping precluded reliance upon the petitioner's admissions rests primarily upon interrogations by New York County District Attorney Frank Hogan in 1943 when the petitioner appeared before the New York County grand jury and the Official Referee in the Appellate Division. State officers had a tap on the petitioner's telephone during several months of 1943. Mr. Hogan made frequent references to the tapped conversations when questioning the petitioner.

The petitioner claims that his admissions of bootlegging activities during Prohibition were impelled by the belief that Mr. Hogan had learned from the tapped conversations the information sought by the questions. It is argued that the wiretaps were illegal under our decision in *Benanti v. United States*, 355 U. S. 96, and that his admissions were therefore to be excluded from evidence as "fruits of the poisonous tree," on the reasoning in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, and *Nardone v. United States*, 308 U. S. 338.

The short answer to this contention is that we conclude from the record that his truthful answers to Mr. Hogan's questions were not given because he thought that the conversations tapped in 1943 revealed his activities in the Prohibition era, but because he realized that these facts had been known to the authorities for some time. None of Mr. Hogan's questions even implies that Mr. Hogan gained his information from the 1943 wiretaps. Mr. Hogan had a transcript of the 1939 federal grand jury minutes of the petitioner's appearance before that body. The petitioner presses no argument in this Court that his admissions before that grand jury were infected with wiretapping. Early in Mr. Hogan's examination, the petitioner admitted that he recalled being questioned before the grand jury in 1939. The questioning at that proceeding had elicited the petitioner's admission of his bootlegging. Furthermore, his arrest and trial under the 1925 indictment for conspiracy to violate the liquor laws were matters of public record. And in 1938 the petitioner had also admitted his bootlegging to the agent for the Bureau of Internal Revenue. It is plain common sense to conclude that this information, long a matter of official knowledge, not something which he thought might have been disclosed in the 1943 wiretaps, impelled the petitioner to answer Mr. Hogan truthfully.

Moreover, District Attorney Hogan testified in the present proceeding. He expressly disavowed that his questions of the petitioner as to his activities during Prohibition were based on the 1943 wiretaps. He testified that his information was derived from files of the District Attorney's office, newspaper reports and court records. Although one of the intercepted telephone conversations was between the petitioner and one O'Connell, a codefendant in the 1925 Prohibition prosecution, Mr. Hogan stated that none of the 1943 wiretaps concerned the petitioner's bootlegging activities. The 1943 grand jury and Appellate Division investigations were concerned only with the petitioner's part in the nomination that year of a candidate for Justice of the State Supreme Court.

It is true that the 1943 wiretaps prompted the calling of the petitioner before the county grand jury and the Official Referee. But the "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an "independent source." *Silverthorne Lumber Co. v. United States*, *supra*, at 392. We said in *Nardone v. United States*, 308 U. S. 338, 341, "Sophisticated argument may prove a causal connection between information obtained through illegal wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." We are satisfied that any knowledge in Mr. Hogan's possession which impelled the petitioner to answer truthfully came from such independent sources and that any connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence.⁴

⁴ The petitioner makes reference to the opinion of the District Court rendered upon the dismissal of the first complaint. That opinion rested the conclusion that the affidavit of good cause and the evidence were infected with wiretapping partly upon wiretaps said

III.

In contending that lapse of time should be deemed to bar the Government from instituting this proceeding, the petitioner argues that the doctrine of laches should be applied to denaturalization proceedings, and that in any event, the delay of 27 years before bringing denaturalization proceedings denied him due process of law in the circumstances of the case.

It has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government. See *United States v. Ali*, 7 F. 2d 728; *United States v. Marino*, 27 F. Supp. 155; *United States v. Cufari*, 120 F. Supp. 941, reversed on other grounds, 217 F. 2d 404; *United States v. Parisi*, 24 F. Supp. 414; *United States v. Brass*, 37 F. Supp. 698; *United States v. Spohrer*, 175 F. 440; *United States v. Reinsch*, 50 F. Supp. 971, reversed on other grounds, 156 F. 2d 678; *United States v. Schneiderman*, 33 F. Supp. 510, reversed on other grounds, 320 U. S. 118. These cases have applied the principle that laches is not a defense against the sovereign. The reason underlying the principle, said Mr. Justice

to have been made in the 1920's. The district judge found "indications of the extensive use of wire taps covering a period of many years and beginning in the 1920's." 145 F. Supp., at 894. However, the district judge in this proceeding heard the testimony of two former Assistant United States Attorneys who conducted the investigation leading to the petitioner's indictment in 1925. The district judge "accepted as true" their testimony "that the Government's information as to the bootlegging activities of Costello was not derived from telephone conversations but was derived from statements of certain individuals acquainted with the defendant's activities." 171 F. Supp., at 25. We see no basis for disturbing this finding and the District Court's conclusion that no taint from wiretaps in the 1920's infected the later admissions made by the petitioner.

Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *United States v. Hoar*, 26 Fed. Cas. 329, 330 (No. 15,373). This Court has consistently adhered to this principle. See, for example, *United States v. Kirkpatrick*, 9 Wheat. 720, 735-737; *United States v. Knight*, 14 Pet. 301, 315; see also *United States v. Summerlin*, 310 U. S. 414, 416; *Board of County Commissioners v. United States*, 308 U. S. 343, 351; *United States v. Thompson*, 98 U. S. 486, 489.

None of the cases in this Court considered the question of the application of laches in a denaturalization proceeding. However, even if we assume the applicability of laches, we think that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense. Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. See *Gallagher v. Caldwell*, 145 U. S. 368, 372; *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 488-490; *Gardner v. Panama R. Co.*, 342 U. S. 29, 31.

The petitioner alleges lack of diligence in the Government's failure to proceed to revoke his certificate within a reasonable time after his arrest and trial under the 1925 indictment for conspiracy to violate the Prohibition laws, or at least within a reasonable time after his admissions before the federal grand jury in 1939. There is no necessity to determine the merits of this argument, for the record is clear that the petitioner was not prejudiced by the Government's delay in any way which satisfies this requisite of laches. In *Brown v. County of Buena Vista*, 95 U. S. 157, 161, this Court said: "The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of wit-

nesses, the muniments of evidence, and other means of proof." Insofar as these factors inherent in the lapse of time were operative in the present case, they seem plainly to have worked to petitioner's benefit, not to his detriment. The evidence of the petitioner's real estate activity consisted almost exclusively of public records. There is no suggestion that these records are not all the evidence of real estate activity there is or that any had been destroyed or were unavailable. Nor do we perceive any prejudice to the petitioner in the fact that the Naturalization Examiners who processed his application, the witnesses who appeared for him, and the judge who admitted him to citizenship, are dead. The examiners and the judge obviously could supply no evidence bearing on his claim that real estate was his occupation. Their knowledge on that subject came from him. And it stretches credulity to suppose that he would have inquired of those officials whether "occupation" meant lawful occupation. Finally, the petitioner does not suggest how the witnesses who supported his petition could have aided him on any issue material in this proceeding. In addition, his bootlegging associate, Sausser, died in 1926, and would not have been available even had the Government brought a proceeding immediately after the criminal trial.

Indeed, any harm from the lapse of time was to the Government's case. Although that case was supported primarily by documentary proofs and the petitioner's admissions, the Government supplemented this evidence with the testimony of the petitioner's associates in the bootlegging enterprise, and of others who had knowledge of those events. The Government's proof was made more difficult when a number of the witnesses admitted that their memories of details had dimmed with the passage of the years.

We cannot say, moreover, that the delay denied the petitioner fundamental fairness. He suffered no prejudice

from any inability to prove his defenses. Rather, the harm he may suffer lies in the harsh consequences which may attend his loss of citizenship. He has been a resident of the United States for over 65 years, since the age of four. We may assume that he has built a life in reliance upon that citizenship. But Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud. On this record, the petitioner never had a right to his citizenship. Depriving him of his fraudulently-acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process. Cf. *Johannessen v. United States*, 225 U. S. 227, 242-243.

IV.

The petitioner moved for leave to amend his petition for a writ of certiorari to add a question whether the present proceeding was barred by the order of the District Court dismissing the earlier proceeding on remand, without specifying whether the dismissal was with or without prejudice. We deferred decision on the motion pending oral argument. The motion is granted and we proceed to determine the merits of the question.

It is the petitioner's contention that the order dismissing the earlier complaint must be construed to be with prejudice because it did not specify that it was without prejudice, and the ground of dismissal was not within one of the exceptions under Rule 41 (b) of the Federal Rules of Civil Procedure. That Rule provides:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal

on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

We hold that a dismissal for failure to file the affidavit of good cause is a dismissal "for lack of jurisdiction," within the meaning of the exception under Rule 41 (b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. *Title v. United States*, 263 F. 2d 28; *United States v. Failla*, 164 F. Supp. 307. We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41 (b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category. *United States v. Zucca*, *supra*; *United States v. Costello*, 356 U. S. 256.

At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In *Haldeman v. United States*, 91 U. S. 584, 585-586, which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a right

between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." A similar view applied to many dismissals on the motion of a defendant. In *Hughes v. United States*, 4 Wall. 232, 237, it was said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also *House v. Mullen*, 22 Wall. 42, 46; *Swift v. McPherson*, 232 U. S. 51, 56; *St. Romes v. Levee Steam Cotton Press Co.*, 127 U. S. 614, 619; *Burgell v. United States*, 80 F. 2d 151; *Gardner v. United States*, 71 F. 2d 63.

We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41 (b), which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where

dismissals "not provided for in this rule" also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a *sua sponte* dismissal by the Court for failure of the plaintiff to comply with an order of the Court should be governed by the same policy. Although a *sua sponte* dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits. See *United States v. Procter & Gamble Co.*, 336 U. S. 677, 680, and footnote 4; *American Nat. Bank & Trust Co. v. United States*, 142 F. 2d 571.⁵

In contrast, the failure of the Government to file the affidavit of good cause in a denaturalization proceeding does not present a situation calling for the application of the policy making dismissals operative as adjudications on the merits. The defendant is not put to the necessity of preparing a defense because the failure of the Government to file the affidavit with the complaint requires the

⁵ The inapplicability of the policy of the rule to other dismissals for failure to meet a precondition of adjudication has been recognized. The Advisory Committee on Amendments to the Federal Rules recommended in 1955 the addition of another specific exception, for dismissals for "lack of an indispensable party." Although the proposal was not adopted, one commentator has written:

"Undoubtedly a dismissal for lack of an indispensable party should be a dismissal without prejudice since the dismissal proceeds on the theory that his presence is required in order that the court may make an adjudication equitable to all persons involved. . . . The Committee's proposal would, however, take care of the situation where the court did not specifically provide that the dismissal was without prejudice; and thus expressly provide a result which the courts, of necessity, would have to reach even if the dismissal did not specify that it was without prejudice." 5 Moore, Federal Practice, 1959, Cum. Supp., p. 38.

dismissal of the proceeding. Nothing in the term "jurisdiction" requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, "jurisdiction" can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-examined in subsequent proceedings and must be brought into controversy in the original action if a defendant is to litigate them at all. See, *e. g.*, *Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552 (diversity of citizenship); *In re Sawyer*, 124 U. S. 200, 220-221 (jurisdictional amount). See generally *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 173-174. Decisions in the lower courts applying the exception construe "jurisdiction" to encompass dismissals on grounds similar to that in the present case. See *Madden v. Perry*, 264 F. 2d 169; *Myers v. Westland Oil Co.*, 96 F. Supp. 667, reversed on other grounds, 181 F. 2d 371. We therefore hold that the Government was not barred from instituting the present proceeding.

Affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 59.—OCTOBER TERM, 1960.

Frank Costello, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[February 20, 1961.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

I do not think "bootlegging" *per se* would have been a ground for denying naturalization to an alien in the 1920's. If it were, it would be an act of hypocrisy unparalleled in American life. For the "bootlegger" in those days came into being because of the demand of the great bulk of people in our communities—including lawyers, prosecutors, and judges—for his products. However that may be, the forms of naturalization in use at the time did not ask for disclosure of all business activities of an applicant nor of all sources of income. If that had been asked and if only one source of income were disclosed, then there would be a concealment relevant to our present problem—whether the nondisclosed income was from bootlegging, playing the races, bridge or poker games, or something else. The "occupation" of an applicant was the question in the form Costello filed.* The form of the petition for naturalization did not ask for more; and unless we can say that "real estate" was not his "occupation" then we cannot let this denaturalization order stand. The Koslo Realty Corporation actually existed and petitioner was its president. It actually engaged in real

*The printed form of the Petition for Naturalization in use at the time had in it as item "Second" a line headed "My occupation is." After these words petitioner entered the words "Real Estate."

estate transactions. The fact that this real estate business was secondary in petitioner's regime did not make it any the less his "occupation." Petitioner answered truthfully when he listed "real estate" as his "occupation." He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government. We could not do so and be true to the strict standard exacted from the Government by *Schneiderman v. United States*, 320 U. S. 118, 122-123.